No. 92-621-CFX
Status: GRANTED

Title: Donald Neal Rake, et al., Petitioners
v.
William J. Wade, Trustee

Docketed:
September 28, 1992

Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Carpenter,David A.

Counsel for respondent: Johnson,Lawrence A.G.

40 cps ptn rcd 9-28-92, 1 retained; 40 corr cps rcd 10-9-92.

Entry	Date	Note	Proceedings and Orders
1	Sep 28 1992	G	Petition for writ of certiorari filed.
2	Oct 19 1992		Brief of respondent William J. Wade in opposition filed.
3	Oct 21 1992		DISTRIBUTED. November 6, 1992
4	Nov 9 1992		Petition GRANTED.
			**********
5	Dec 21 1992		Joint appendix filed.
6	Dec 23 1992		Brief of petitioners Donald Neal Rake, et al. filed.
7	Dec 28 1992	G	Motion of Consumer Education and Protective Assn.,et al. for leave to file a brief as amici curiae filed.
8	Dec 28 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Tenth Circuit.
14	Jan 6 1993	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
9	Jan 11 1993		Motion of Consumer Education and Protective Assn.,et al. for leave to file a brief as amici curiae GRANTED.
10	Jan 21 1993		Brief of respondent William J. Wade filed.
11	Jan 25 1993		Brief amicus curiae of United States filed.
12	Feb 3 1993		SET FOR ARGUMENT MOMDAY, MARCH 22, 1993. (3RD CASE).
13	Feb 4 1993		CIRCULATED.
16	Feb 19 1993	X	Reply brief of petitioners filed.
15	Feb 22 1993		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
17	Mar 10 1993		Record filed.
		*	Certified proceedings United States District Court for the Northern District of Oklahoma.
18	Mar 22 1993		ARGUED.

92-621

No._____

Supreme Court, U.S.
FILED
SEP 28 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

DONALD NEAL RAKE, LINDA JEAN RAKE,
EARNEST WILLIAM YELL,
AND MARY KATHRYN YELL,

Petitioners,

v.

WILLIAM J. WADE, TRUSTEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October 2, 1992

QUESTIONS PRESENTED

I. Did the Tenth Circuit Court of Appeals erroneously interpret this Court's opinion in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), so as to require debtors under Chapter 13 of the United States Bankruptcy Code (title 11, United States Code) to pay interest on arrearages and other charges incident to curing a default with respect to an over-secured claim which is secured solely by a mortgage on real property which constitutes the principal residence of such debtors?

II. Did the Tenth circuit Court of Appeals create or contribute to an inter-circuit conflict by (mis)reading this Court's decision in *United States v. Ron Pair Enterprises, Inc.*, *supra*, as requiring a debtor under Chapter 13 of the U.S. Bankruptcy Code to pay interest on pre-petition arrearages and other charges in order to effect a cure of default, as provided in 11 U.S.C. § 1322(b)(5), in those instances in which the claim in default is both over-secured and secured only by real property constituting the principal residence of the debtor, while other circuits have correctly held that such interest is not required, and in fact would violate the provisions of 11 U.S.C. § 1322(b)(2) which prohibits a chapter 13 plan from modifying the rights of holders of claims which are secured solely security interests in real property which constitutes the principal residence of the debtor?

LIST OF PARTIES

In addition to the names of the parties to the proceeding appearing in the caption of the case, Ronnie Hannon and Rosetta Hannon were parties before the United States Bankruptcy Court for the Northern District of Oklahoma and to the consolidated appeals before the United States District Court for the Northern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit.

RULE 29.1 STATEMENT

As required by Rule 29.1 of this Court, Petitioners aver that there are no parent or subsidiary companies to be listed herein.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
RULE 29.1 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTES IN ISSUE	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING CERTIORARI	5
RELIEF REQUESTED AND CONCLUSION	14
APPENDIX	A-1

TABLE OF AUTHORITIES

Page

CASES

Best Repairco v. United States, 789 F. 2d at 1082 9

Cardinal Federal Savings & Loan Association v. Colegrove, 771 F. 2d 119 (6th Cir. 1985) 11, 12

Foster Mortgage Corp. v. Terry, 780 F. 2d 894 (11th Cir. 1985) 12

In re: Appeal of Capps, 836 F. 2d 773 (3rd Cir. 1987) . . 13

Jim Walter Homes, Inc. v. Spears, 894 F. 2d 1227 (10th Cir. 1990) 10

Landmark Financial Services v. Hall, 918 F. 2d 1150 (4th Cir. 1990) 13

Shearson Lehman Mortgage Corp. v. Laguna, 944 F. 2d 542 (9th Cir. 1991) 13

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) . . . . . i, 4, 5, 7, 8, 9, 10, 14

STATUTES

11 U.S.C. § 506 . . . . . 2, 8

11 U.S.C. § 1322 . . . . . i, 2, 4, 5, 9, 10, 11, 12

11 U.S.C. § 1325 . . . . . 2, 4, 8, 12

28 U.S.C. § 1254(1) 2

SUPREME COURT RULES

Rule 13.1 2

Rule 13.4 2

Rule 29.1 ii

TREATISES

Collier ¶ 1322.09[04] 12, 13

*No.*_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

DONALD NEAL RAKE, LINDA JEAN RAKE,
EARNEST WILLIAM YELL,
AND MARY KATHRYN YELL,

Petitioners,

v.

WILLIAM J. WADE, TRUSTEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Donald Neal Rake, Linda Jean Rake, Earnest William Yell and Mary Kathryn Yell ("Petitioners") ask this Court for a writ of Certiorari to review the July 1, 1992 decision of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion below is officially published at 968 F.2d 1036 (10th Cir. 1992). A - 26.[1] In that opinion, the Tenth Circuit reversed a consolidated order of the United States District Court for the Northern District of Oklahoma. A - 19. The District Court's consolidated order itself had affirmed three unconsolidated orders of the United States Bankruptcy Court for the Northern District of Oklahoma. A - 7, A - 13, and A - 16.

JURISDICTION

The Judgment sought to be reviewed was entered by the United States Court of Appeals for the Tenth Circuit on July 1, 1992. A - 26. There have been no requests for rehearing before the United States Court of Appeals for the Tenth Circuit, nor any orders entered granting extensions of time in which to file a petition for a writ of certiorari. The statutory provision conferring jurisdiction on this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit in question by writ of certiorari is 28 U.S.C. § 1254(1). This petition for certiorari is being filed under Rules 13.1 and 13.4 of this Court.

STATUTES IN ISSUE

This case involves the following constitutional provisions, statutes, and regulations, which are fully reprinted in the Appendix: 11 U.S.C. §§ 506, 1322, and 1325.

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[1] The Appendix to this petition is cited as "A - ___."

STATEMENT OF THE CASE

The relevant facts in each of the underlying Chapter 13 Bankruptcy proceedings, consolidated for appellate purposes, are virtually identical, as follows:

Petitioners are mortgagors of various real estate mortgages which secure the Respondent as to repayment of the Petitioners' respective promissory notes, and which were made payable to Respondent's assignor, Jim Walter Homes, Inc. Each of the debts to Respondent is secured only by a security interest in the particular real property which constitutes each such Petitioner's principal residence. Each debt to Respondent, insofar as concerned with this Petition, constitutes a claim, pursuant to the provisions of the United States Bankruptcy Code.[2]

As to each claim, the Respondent is considered to be "over-secured", as the value of the particular collateral securing each claim of Respondent exceeds the amount of each such claim.

Each petitioner was in default of the terms of his or her promissory note to Respondent as of the date of commencement of each respective chapter 13 bankruptcy proceeding. Each chapter 13 plan proposed to repay the amount of the then existing arrearage to the Respondent over the life of each such chapter 13 plan, without payment of interest, but including the contractually bargained for late payment penalties. None of the security interests or promissory notes herein concerned provided for any separate charge for interest on late payments of any regular installment due, each such note providing for a maximum

[2] Title 11, United States Code.

late payment penalty of Five Dollars ($5.00) per late payment - without regard to when such default was to be cured.

Respondent timely objected to treatment afforded his various arrearage claims in the underlying bankruptcy proceedings, and the bankruptcy court denied each of these objections. A - 7, A - 13, and A - 16.

The United States District Court for the Northern District of Oklahoma, sitting in its appellate capacity, affirmed the decisions of the bankruptcy court. A - 19.

The United States Court of Appeals for the Tenth Circuit reversed and remanded, holding that "in Chapter 13 plans an over-secured mortgagee of the debtor's personal residence is entitled to post-petition interest on arrearages and other charges even if the mortgage instruments are silent on the subject and state law would not require interest to be paid." A - 41.

The Tenth Circuit has misinterpreted this Court's holding in *United States v Ron Pair Enterprises, Inc., supra*, both in requiring interest to be paid on arrearages being cured under a chapter 13 plan, as well as requiring interest to be paid on other charges incident to curing under 11 U.S.C. § 1322(b)(5), such as attorney's fees, late payment penalties and, in an appropriate case, costs of foreclosure.

Petitioners request this Court to reverse the Tenth Circuit Opinion and resolve the inter-circuit conflict by clarifying the correct rule, that interest may not be required to be paid as an incident of cure under 11 U.S.C. § 1325(b)(5) in those instances in which the documents underlying the secured claim do not provide for the payment of such interest when curing a default.

REASONS FOR GRANTING CERTIORARI

This Court should grant Certiorari, in this case for two reasons:

(i) The Tenth Circuit Court of Appeals erroneously interpreted this Court's Opinion in *Ron Pair* by requiring chapter 13 Debtors to pay interest as an incident to the curing of defaults to the Respondent, who holds over-secured claims in each of the consolidated cases, which claims are secured solely by security interests in the respective principal residences of the debtors;

(ii) The Tenth Circuit either created an inter-circuit conflict by its decision below, or in the alternative contributed to an already existing conflict, by misreading *Ron Pair* as requiring interest to by paid by a chapter 13 debtor in order to effectuate the curing of a default to an over-secured claimant pursuant to 11 U.S.C. § 1322(b)(5), in those instances in which the claim in default is secured solely by real property constituting the principal residence of the Chapter 13 debtor.

The writ of Certiorari is thus needed to resolve the inter-circuit conflict which has widespread implications in, literally, thousands of Chapter 13 bankruptcy proceedings in which debtors are chiefly concerned with saving their homes by "de-accelerating" home mortgages in arrears, by curing defaults and continuing regular monthly payments as permitted by 11 U.S.C. § 1322(b)(5).

Further, the impact of the Tenth Circuit opinion in not limited to debtors and holders of home mortgages, but extends to all unsecured creditors in Chapter 13 cases in which dividends to holders of unsecured claims is less than 100 percent. In those instances, unsecured creditors bear the brunt of the Tenth Circuit opinion, as interest required to cure the default on a typical home mortgage under a Chapter 13 plan would, inevitably, be diverted from dividends which otherwise would be paid to holders of unsecured claims.

The perpetuation of the inter-circuit conflict which has now developed will have a widespread and disruptive impact upon bankruptcy courts nationwide, as a substantial percentage of Chapter 13 bankruptcy proceedings involve the curing of arrearages on home mortgages, and creditors, uncertain as to their rights with respect to the inter-circuit conflict, will flock to the bankruptcy courts, inundating the courts with motions to determine the necessity of payment of interest on home mortgage arrearages cured under a Chapter 13 plan. This conflict effectually destroys the Congressional purpose of uniformity in administration of the bankruptcy laws.

Only Certiorari relief from this Court can correct the erroneous ruling of the Tenth Circuit and restore uniformity among the circuits as to this vital issue now before this Court.

(I)

The Tenth Circuit Court Appeals erroneously interpreted this Court's opinion in *Ron Pair* by requiring Chapter 13 debtor's to pay interest as an incident to the curing of a default to the holder of an over-secured claim, which claim is secured solely by a security interest in a real property which constitutes the debtor's principal residence.

The Court of Appeals for the Tenth Circuit, in issuing its opinion below, overgeneralized the holding of this Court in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), as stating that every over-secured creditor is entitled to post-petition interest on every secured debt in every bankruptcy proceeding. In point of fact, however, the holding in *Ron Pair, supra*, is much more limited than the broad brush interpretation painted by the Tenth Circuit.

The holding of *Ron Pair* is limited to its peculiar facts. In that case, the United States government, through the Internal Revenue Service, maintained an involuntary tax lien on real property held by the debtor-in-possession, Ron Pair Enterprises, Inc., in the context of a Chapter 11 bankruptcy proceeding. The government was deemed over-secured as the value of the debtor-in-possession's interest over and above all other encumbrances, exceeded the amount of the tax claim. This Court correctly held that in this instance, the over-secured status of the government in a Chapter 11 context entitled the government to post-petition interest, the distinction being whether, in a Chapter 11 context, the creditor was deemed over-secured, and not whether the lien upon the property in question was of a consensual nature or not.

Ron Pair stands for the proposition that the over-secured creditor in a Chapter 11 context must be awarded post-petition interest in a Chapter 11 plan of reorganization, or such plan is subject to a valid objection by such over-secured creditor.

In the matter before this Court today, *Ron Pair* is inapplicable.

First, *Ron Pair* dealt only with the situation of an over-secured creditor in a Chapter 11 context. The overlay of the provisions of Chapter 13 of the Bankruptcy Code significantly impacts the applicability of *Ron Pair* to the case at bar.

Second, in *Ron Pair* the debtor-in-possession, being a corporation, could not have any title ownership in real property constituting a principal residence, as that phrase is used in 11 U.S.C. § 1325, as corporations, not being natural persons, cannot have places of residence.

Third, in *Ron Pair* the debtor-in-possession was not seeking to cure an arrearage or default for nonpayment of the secured debt while continuing payments, as the debtors before this Court are seeking to do.

The Tenth Circuit also misinterpreted *Ron Pair* in requiring post-petition interest to be paid on fees, costs, and other charges as provided in the agreement under which such over-secured claim arose. The specific language of 11 U.S.C. § 506(b) provides that no interest shall be allowed on such fees, costs and other charges, as this Court properly observed in *Ron Pair* at 241:

This reading is also mandated by the grammatical structure of the statute. The phrase 'interest on such claim' is set aside by commas, and separated from the referenced to fees,

costs, and charges by the conjunctive words 'and any.' As a result the phrase 'interest on such claim' stands independent of the language that follows. '[I]nterest on such claim' is not part of the list made up of 'fees, costs, or charges' nor is it joined to the following clause so that the final 'provided for under the agreement' modifies it as well. See *Best Repairco v. United States*, 789 F. 2d, at 1082. The language and punctuation Congress used cannot be read in any other way. By the plain language of the statute, the two types of recovery are distinct. (footnotes omitted)

Notwithstanding this very explicit language in *Ron Pair*, the Tenth Circuit ignored such language in holding:

> [I]n Chapter 13 plans an over-secured mortgagee of the debtor's personal residence is entitled to post-petition interest on arrearages *and other charges* even if the mortgage instruments are silent on the subject and state law would not require interest to be paid. A - 41 (emphasis added).

The Tenth Circuit is itself confused with respect to Chapter 13 matters. In the case at bar, the Tenth Circuit stated:

> [T]he cure contemplated by [11 U.S.C.] § 1322(b) in fact does modify the mortgagee's rights under the mortgage contract by (1) denying effect to acceleration clauses in mortgages -- allowing cure within a 'reasonable time'; (2) denying the mortgagees [sic] the right to foreclose; and (3) abridging the contract provisions that all payments in default are immediately due and payable.

Two years previously, the Tenth Circuit, in another opinion written by Judge Logan, *Jim Walter Homes, Inc. v. Spear*s, 894 F. 2d 1227 (10th Cir. 1990), in footnote 4 at 1228 stated:

> Section 1322(b)(2) prohibits *modification* of security interests in a mortgage on real estate that constitutes the debtors' personal residence, but § 1322(b)(3) and (5) permit *curing* of any default. All of the cases above cited [citations omitted] agree that if a residential mortgage is in default, triggering contractual acceleration of the mortgage debt, a chapter 13 plan to 'de-accelerate' by paying the amount of the original default rather than the entire accelerated debt, is a permissible cure, not a prohibited a modification. (emphasis in original.)

The Tenth Circuit Opinion in *Jim Walter Homes, Inc. v. Spears, supra*, was rendered post-*Ron Pair*, and without explanation, the Tenth Circuit asserts that curing a default now constitutes a modification of the original mortgage, whereas the same treatment did not constitute a prohibited modification in the tenth Circuit two years previously, in 1990.

It must be held in mind that the prohibition on modification of a claim in a Chapter 13 proceeding secured only by a mortgage on real estate which constitutes the debtors' principal residence, relates only to the Chapter 13 plan. That is to say, a Chapter 13 plan may not so modify a "home mortgage". There is no prohibition upon on Congress' modifying the rights of holders of such secured claims through the vehicle of the bankruptcy code. This is exactly what has happened with respect to the enactment of 11 U.S.C. § 1322(b)(2) and (5). The curing of a default within the context of Chapter 13, whether related to a "home mortgage" or any other secured claim, takes place, not as a function of the Chapter 13 plan, but by utilization of the provision permitting cure under

the Bankruptcy Code itself. The Tenth Circuit, in requiring the payment of post-petition interest on the arrearage claims before this Court, has itself done violence to 11 U.S.C. § 1322(b)(2) by requiring that the Chapter 13 plan now provide for interest on the payment of delinquent installment payments, where neither the Bankruptcy Code, nor the underlying documents creating this claim, require the payment of such interest. Further, it is not the plan which modifies the rights of holders of "home mortgages" being cured in a Chapter 13 proceeding by preventing them from pursuing state remedies, such as foreclosure, but the Bankruptcy Code itself.

(II)

The Tenth Circuit of Appeals has created or contributed to an existing inter-circuit conflict by joining the Sixth Circuit, in requiring post-petition interest to be paid on delinquent "home mortgage" installments being cured in a Chapter 13 plan pursuant to 11 U.S.C. § 1322(b)(5).

In issuing its opinion below, the Tenth Circuit joined the Sixth Circuit in requiring the post-petition interest as an element of a Chapter 13 cure of a delinquent home mortgage. The Sixth Circuit Court of Appeals, in the case of *Cardinal Federal Savings & Loan Association v. Colegrove*, 771 F. 2d 119 (6th Cir. 1985) was the first circuit to require post-petition interest as an incident to the cure of the home mortgage default under Chapter 13. This case, has not been without its critics. In the *Colegrove* decision itself, Judge Celebrezze wrote a strong dissent which has been cited with approval by numerous other jurisdictions. Further, the editor of the leading treatise on bankruptcy is also harshly critical of *Colegrove*:

As discussed above section 1322(b)(5) was intended to codify the practice under which foreclosure was enjoined during the pendency of a Chapter XIII plan under the former Bankruptcy Act, with the debtor given a reasonable amount of time to cure defaults. Since that cure occurred under non-bankruptcy law, the interest and costs to which the mortgagee was entitled were determined under applicable non-bankruptcy law. Nothing in the Code or its legislative history indicates any intent to alter those rights where a cure is effectuated under section 1322(b)(5).

... The present value tests [of 11 U.S.C. § 1325(a)] compensate creditors whose rights have been modified by reductions in payments, interest charges or the total amount due; where a default is cured, however, the creditor's rights are not modified. Since the contract terms remain in force (except for the injunction against foreclosure) the time value of money is irrelevant. The creditor receives the interest, charges, and costs to which it is entitled under the contract and applicable non-bankruptcy law. Typically, the creditor is not entitled under its contract to receive interest on previously accrued interest (compound interest) or on attorneys' fees and costs, as would result under *Colegrove* Court's decision.

Collier ¶ 1322.09[04] at 1322-23 and 1322-24.

Those jurisdictions which have denied post-petition interest upon the curing of a defaulted home mortgage under Chapter 13 are the Eleventh Circuit, in *Foster Mortgage Corp.*

v. Terry, 780 F. 2d 894 (11th Cir. 1985), the Third Circuit, in *In re: Appeal of Capps*, 836 F. 2d 773 (3rd Cir. 1987), the Fourth Circuit, in *Landmark Financial Services v. Hall*, 918 F. 2d 1150 (4th Cir. 1990) and the Ninth Circuit, in *Shearson Lehman Mortgage Corp. v. Laguna*, 944 F. 2d 542 (9th Cir. 1991). In each of these cases, the circuit courts have determined, along with the editor of Collier's, *supra* that cure within the context of 11 U.S.C. § 1322(b)(3) and (5) is effected outside the Bankruptcy Code under applicable non-bankruptcy (state) law. These courts further conclude that the legislative history of 11 U.S.C. § 1322 indicates Congress had no intent to modify prevailing practice under Chapter XIII of the previous Bankruptcy Act, which did not permit interest as an incident to a post-petition cure.

Although the Tenth Circuit pays lip service to these conflicting jurisdictions, as well as the editor of Collier's, that Court brushed past this considerable body of law, based upon what appears to be the slightest of policy considerations regarding protection of home mortgagees.

Allied against the overwhelming weight of authority at the circuit level, as well as the leading treatise on bankruptcy, stands a divided Sixth Circuit and, now, the Tenth Circuit. Since the Tenth Circuit cannot itself determine whether curing of the default in a Chapter 13 proceeding constitutes a prohibited modification or not, the uncertainty which must necessarily result from the decisions of the divided Sixth Circuit and the schizophrenic Tenth Circuit will inevitably result in substantial confusion in those circuits which have not yet passed upon this issue. Perhaps more importantly, is the impact upon holders of unsecured claims across this country in the Chapter 13 context. As there is no balloting on the appropriateness of a Chapter 13 plan by creditors, such as is the case in the Chapter 11 context, the practical impact of requiring post-petition interest to paid on

arrearages and other charges, as now required by the Tenth Circuit, rests squarely upon "backs" of holders of unsecured claims. Except in the comparatively rare circumstances in which a Chapter 13 plan proposes to pay no dividends to holders of unsecured claims or, in the alternative, 100% of all unsecured claims, the payments into a Chapter 13 plan which, under the holding of the Tenth Circuit, must be devoted to interest on home mortgage arrearages, must inevitably be diverted from dividends which would otherwise be paid to holders of unsecured claims. In most instances, it is the unsecured creditors, and not the debtors who will suffer as result of the Tenth Circuit's Opinion here. Therefore, the field of impacted parties spreads far beyond the set of debtors and home mortgagees, but extends to all unsecured creditors holding claims in Chapter 13 bankruptcy proceedings. This uncertainty can only be resolved by Court's granting Certiorari and correcting the erroneous decision of the Tenth Circuit.

RELIEF REQUESTED AND CONCLUSION

The Petitioners urge this Court to grant Certiorari to correct the Tenth Circuit's error, to clarify the extent of this Court's holding in *Ron Pair* and to resolve the existing conflict among the circuit courts. Alternatively, the Petitioners request that this Court grant this Petition for Certiorari, summarily reverse the decision of the Tenth Circuit, and reinstate the decisions of the District and Bankruptcy Courts which correctly denied post-petition interest to the Respondent. At the very least, the Petitioners ask this Court to grant Certiorari and remand this case to the Tenth Circuit with instructions to reconsider, follow the holdings of the Third, Fourth, Ninth and Eleventh Circuits, and deny post-petition interest to the Respondent.

Respectfully Submitted,

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APPENDIX

APPENDIX CONTENTS

	Page
STATUTES AND REGULATIONS	
11 U.S.C. § 506	A - 1
11 U.S.C. § 1322	A - 2
11 U.S.C. § 1325	A - 4
OPINIONS OF COURTS	
Amended Memorandum Opinion of the United States Bankruptcy Court for the Northern District of Oklahoma (Hannon) June 25, 1991	A - 7
Order of the United States Bankruptcy Court for the Northern District of Oklahoma (Rake) August 2, 1991	A - 13
Memorandum Decision of the United States Bankruptcy Court for the Northern District of Oklahoma (Yell) August 13, 1991	A - 16
Order of the United States District Court for the Northern District of Oklahoma (consolidated appeal) December 16, 1991	A - 18
Decision of the United States Court of Appeals for the Tenth Circuit, July 1, 1992	A - 26

STATUTES AND REGULATIONS

Title 11, United States Code (1978, as amended)

§ 506. Determination of secured status.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of the creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against a debtor that is not an allowed secured claim, such lien is void unless --

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of claim under section 501 of this title.

§ 1322. Contents of plan.

(a) The plan shall --

(1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and

(3) if the plan classifies claims, provide the same treatment for each claim within a particular class.

(b) Subject to subsections (a) and (c) of this section, the plan may --

(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated, however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other secured claims;

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

(3) provide for the curing or waiving of any default;

(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

(6) provide for the payment of all or any part of any claim allowed under section 1305 of this title;

(7) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(8) provide for payment of all or part of a claim against the debtor from property of the estate or property of the debtor;

(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity; and

(10) include any other appropriate provision not inconsistent with this title.

(c) The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.

§ 1325. Confirmation of plan.

(a) Except as provided in subsection (b), the court shall confirm a plan if --

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan --

(A) the holder of such claim has accepted the plan;

(B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b) (1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan --

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in a three year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended --

(A) for the maintenance or support of the debtor or a dependent of the debtor; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(c) After confirmation of a plan, the court may order any entity from which the debtor receives income to pay all or any part of such income to the trustee.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	**CASE NO. 91-01263-C**
RONNIE HANNON and	)	**Chapter 13**
ROSETTA HANNON,	)	
	)	
Debtors.	)	

AMENDED MEMORANDUM OPINION[1]

On April 25, 1991, the Debtors filed a petition for relief under Chapter 13 of the Bankruptcy Code. The Debtors listed their residence as an asset valued at $72,175.00 and subject to a first mortgage in favor of William J. Wade, Trustee, in the amount of $32,175.00.

The Debtors plan of repayment provided that all post-petition payments due on the mortgage would be paid direct to the Mortgagee as they became due. At the time of filing the petition for relief the Debtors were in arrears on their monthly payments in an amount of $1,513.80 and the Mortgagee had commenced foreclosure proceedings in the state court. The Debtors proposed to pay this arrearage, which they estimated to be $1,680.00, at $20.00 per month for sixty (60) months, with no interest. This was offered pursuant to Section 1322(b)(5) which provides in substance that a pre-petition default in the

---

[1] This Amended Memorandum Opinion replaces the Memorandum Opinion entered herein June 25, 1991, and discussed in Court that day.

payment of a secured claim can be cured within a reasonable time (de-acceleration).

The Mortgagee objected to the confirmation of the plan because the plan did not propose to pay interest on the mortgage arrearages as follows:

Payments due:
$1,513.80

Insurance advanced:	800.00
Taxes advanced:	61.07
Late fees:	60.00
Attorney fees advanced:	750.00
Court costs advanced	100.00
Total arrearages:	3,284.00

The Mortgage provides as follows:

1. If a monthly payment was not paid within fifteen (15) days the Debtors would be charged a late payment of Five Dollars ($5.00).

2. If the Mortgagee had to advance insurance or taxes such amounts would be added to the Mortgage debt and would bear interest at the rate of Ten Percent (10%).

3. If the Mortgagee incurs attorney fees and court costs in foreclosing on the Mortgage or attempting to collect the debt, these expenses would be added to the Mortgage indebtedness.

The Debtors contend that the Mortgagee is not entitled to interest on the arrearages because it was not provided for in the Mortgage.

Conclusions of Law

The majority rule is that Mortgagees are not entitled to interest on mortgage arrearages due and owing on the Debtors' residence unless the mortgage provides for it. See In re Stamper, 84 B.R. 519 (Bkrtcy. N.D. Ill. 1988); In re Terry, 780 F.2d 894 (11th Cir. 1985); Appeal of Capps, 836 F.2d 773 (3rd Cir. 1987); Collier on Bankruptcy, Volume 5, Section 1322.09(4). Contra, In re Colegrove, 771 F.2d 119 (6th Cir. 1985); In re Thomas, 115 B.R. 305 (Bkrtcy. E.D. Okla. 1990).

This Court expressly adopts the reasoning of Judge Ginsberg in Stamper.

Pursuant to these cases, the Court will allow interest on the $861.07 owed the Mortgagee for insurance and taxes, at ten percent (10%) interest, as provided for in the mortgage. This amount is to be paid by the Trustee over the sixty month life of the Plan. The unpaid pre-petition monthly payments in the amount of $1,513.80, plus the $60.00 late fee, will be paid by the Trustee over the sixty month life of the Plan without interest. A reasonable attorney fee, as allowed by this Court after a hearing, plus the $100.00 costs, will be paid by the Trustee over the sixty month life of the Plan without interest. Interest is not allowed on the past due payments, attorney fees and court costs, because it is not provided for in the mortgage.

The Debtor will pay directly to the Mortgagee the principal amount due on the mortgage on the date of bankruptcy, in monthly installments, at the contract rate of interest, over the term of the mortgage. In determining the principal amount due on the mortgage, the arrearages discussed above are not to be included because they are being paid as indicated.

SO ORDERED.

Dated this 26 day of June, 1991.

s/ Stephen J. Covey
Stephen J. Covey
United States Bankruptcy Judge
Northern District of Oklahoma

CERTIFICATE OF MAILING

I, Kay Gizzi, hereby certify that on this 26th day of June, 1991, I mailed a true and correct copy of the attached **Amended Memorandum Opinion** to all parties listed below.

Lonnie D. Eck
1508 South Carson
Tulsa, OK 74119

Lawrence A. G. Johnson
2535 East 21st Street
Tulsa, OK 74114

Harvey C. Carpenter
Suite One
4835 South Peoria Avenue
Tulsa, OK 74105

Donald A. Flasch
5136 East 21st Street
Tulsa, OK 74114

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Tulsa, OK 74119-4016

Bruce G. Straub
Suite 705
5310 East 31st Street
Tulsa, OK 74135

Katherine Vance
Assistant U.S. Trustee
Room 3130, U.S. Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103

s/ Kay Gizzi
Kay Gizzi
Secretary to Judge Covey

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	**Case No. 91-01433-C**
	)	**Chapter 13**
DONALD NEAL RAKE and	)	
LINDA JEAN RAKE,	)	
	)	
Debtors.	)	

ORDER

Following the reasoning of In re Ronnie Hannon and Rosetta Hannon, Case Number 91-01263-C, Chapter 13 (Bankr. N.D. Okla. 1991) which expressly adopted the reasoning of Judge Ginsburg in In re Stamper, 84 B.R. 519 (Bankr. N.D. Ill. 1988), concerning the allowance of interest on mortgage arrearages in a chapter 13 plan. Following these cases, the Court will allow interest on the $1,732.20 owed the mortgagee for insurance, at ten percent (10%) interest, as provided for in the mortgage. This amount is to be paid by the Trustee over the twenty-four (24) month life of the plan. The unpaid pre-petition monthly payments in the amount of $2,196.40, plus the $60.00 late fee, will be paid by the Trustee over the twenty-four (24) month life of the plan without interest. A reasonable attorney fee, as allowed by this Court after a hearing, will be paid by the Trustee over the twenty-four month life of the plan without interest. Interest is not allowed on the past-due payments, attorney fees and court costs, because it is not provided for in the mortgage.

The Debtor will pay directly to the mortgagee the principle amount due on the mortgage on the date of bankruptcy, in monthly installments, at the contract rate of interest, over the term of the mortgage. In determining the principle amount due on the mortgage, the arrearages discussed above are not to be included because they are being paid as indicated.

Dated this 2 day of August, 1991.

s/ Stephen J. Covey
Stephen J. Covey
United States Bankruptcy Judge
Northern District of Oklahoma

CERTIFICATE OF MAILING

I, Kay Gizzi, hereby certify that on this 2nd day of August, 1991, I mailed a true and correct copy of the attached Order to all parties listed below.

Harvey Carpenter
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Tulsa, Oklahoma 74103

s/ Kay Gizzi
Kay Gizzi
Secretary to Judge Covey

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

ERNEST WILLIAM YELL and	)	Case No. 91-01685-W
MARY KATHRYN YELL,	)	Chapter 13
	)	
Debtors.	)	

MEMORANDUM DECISION

The question before the Court is whether the plan proposed by the debtors in Chapter 13 may be confirmed when the plan does not provide for interest on arrearages.

At the time of the filing of the bankruptcy, the debtor was $866.00 in arrears on payments due under the note, secured by a first mortgage on the homestead of the debtor.

The debtors filed their Ch. 13 Plan on May 17, 1991 which provided for arrearages of $866.00 to be paid, without interest, over the term of the Plan. The creditor Wade, who holds a first mortgage on the principal residence of the debtors, objects to the Plan, because no interest is provided for in the Plan on the arrearages.

This Court adopts the recent decision of Bankruptcy Judge Stephen J. Covey, In re Ronnie and Rosetta Hannon, Memorandum Opinion date June 26, 1991, Case No. 91-012363-C (B.C. N.D. Okla. 1991) ___ B.R. ___, wherein the holders of mortgages are not entitled to interest on mortgage arrearages due and owing on the debtors' residence. Further, there has been no modification of the creditors rights, as there has been no reduction in payments, interest charges or total amount due, as the provisions of the mortgage contract remain unaltered.

The parties have agreed the creditor Ware [sic] is over-secured; that is, the value of the property securing the obligation of the creditor is in excess of amount owed. The parties further agree the creditor Wade's attorney, Mr. Johnson, has expended time of a value of $900.00 and the time was reasonably expended and the hourly rate is agreeable. Debtor does object to the allowance of any attorney fees, post-petition, as "no provision in law permits post-petition attorney fees to be granted for filing creditors claims." This court disagrees. 11 U.S.C. § 506(b) allows "over-secured creditors reasonable fees, costs and charges, if provided for in the agreement (mortgage). This mortgage contract does so provide. Limited by reasonableness, whether pre-petition or post-petition, the creditor is entitled to recover its "costs," without interest (including a court approved amount representative of the necessary reasonable attorney fees [here agreed to be $900.00]).

Accordingly, the objection to the debtors' Ch. 13 Plan by the creditor Wade on the grounds the arrearages should bear interest is denied; and the objection is granted in regard to an increase in the amount of the arrearage to include attorney fees in the sum of $900.00.

AND IT IS SO ORDERED.

Dated: August 13, 1991.

s/ Mickey D. Wilson
MICKEY D. WILSON
UNITED STATES BANKRUPTCY JUDGE

c: David A. Carpenter
Lawrence A.G. Johnson
Lonnie Eck

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM J. WADE, TRUSTEE,	)	
	)	
APPELLANT,	)	
	)	
VS.	)	
	)	
RONNIE HANNON AND ROSETTA HANNON,	)	
	)	
APPELLEES,	)	
	)	
VS.	)	
	)	
DONALD NEAL RAKE AND LINDA JEAN RAKE,	)	No. 91-C-477-E,
	)	(Consolidated)
	)	91-C-572-E, and
APPELLEES,	)	91-C-632-E
	)	
	)	
WILLIAM J. WADE, TRUSTEE,	)	
	)	
APPELLANT,	)	
	)	
VS.	)	
	)	
EARNEST WILLIAM YELL AND MARY KATHRYN YELL,	)	
	)	
APPELLEES.	)	

ORDER

The Appellees are debtors in three separate Chapter 13 bankruptcy proceedings in the United States Bankruptcy Court for the Northern District of Oklahoma. All Appellees are in arrears on payments due under their respective first mortgages to William J. Wade, Trustee ("Wade").

In each Chapter 13 Plan, the arrearages due Wade were scheduled to be paid with the contractual $5.00 penalty for each late month, but without interest on the total arrearages, although attorney fees were provided for in these plans to Wade's attorney, no interest was to be paid on the allowed secured claims for these attorney fees.

In each case the Chapter 13 Plans were confirmed by the Bankruptcy Court and no interest on arrearages or on attorney fees was awarded. Appellant appeals from the lower courts' denials of interest.

Appellant relies on In Re Thomas, 115 B.R. 305 (Bankr. E.D. Okla. 1990), In Re Latimer, 110 B.R. 968 (W.D. Okla. 1989), Hardzog v. Federal Land Bank of Wichita, 901 F.2d 858 (10th Cir. 1990), and U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989). However, the court finds these authorities unpersuasive.

The courts in In Re Thomas and In Re Latimer relied on In Re Colegrove, 771 F.2d 119 (6th Cir. 1985), in determining that interest was due on arrearages. The court in In Re Colegrove held that interest was required by § 1325(a)(5)[1] of

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[1] Title 11 of the Bankruptcy Code, § 1325(a), states in pertinent part as follows:

> (a) Except as provided in subsection (b), the court shall confirm a plan if -

Title 11 of the Bankruptcy Code, despite, the fact that the creditor's rights had not been subjected to modification pursuant

---

> (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;
>
> (2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
>
> (3) the plan has been proposed in good faith and not by any means forbidden by law;
>
> (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;
>
> (5) with respect to each allowed secured claim provided for by the plan -
>
> (A) the holder of such claim has accepted the plan;
>
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
>
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
>
> (C) the debtor surrenders the property securing such claim to such holder; and
>
> (6) the debtor will be able to make all payments under the plan and to comply with the plan.

to that provision. The majority based its conclusion on the fact that it had previously held that even unsecured creditors were entitled to interest under § 1325 in some cases under the best interests of creditors test, so it would be anomalous to deny interest to a secured creditor in a cure situation. The dissent in Colegrove pointed out that neither the present value test of § 1325(a)(5), nor the best interest of creditors test of § 1325(a)(4), applies where a default is cured pursuant to § 1322(b)(5).[2]

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[2] Title 11 of the Bankruptcy Code, § 1322(b), states in part;

> (b) Subject to subsections (a) and (c) of this section, the plan may -
>
> (1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debtor of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims
>
> (2) modify the rights of holders of secured claims, other that a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;
>
> (3) provide for the curing or waiving of any default;
>
> (4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due....

Section § 1322(b)(5) merely requires that a Plan may provide for the curing of any default within a reasonable time. When a default is cured under § 1322(b)(5), a creditor's rights are not modified. The contract terms remain in force, except for the injunction against foreclosure. However, under the present values of § 1325(a), a creditor is compensated when his rights have been modified by a reduction in payments, interest charges, or the total amount due. Under § 1322(b)(5), the creditor receives the interest, charges and costs to which he is entitled under the contract and non-bankruptcy law. Usually a creditor is not entitled under its contract to receive interest on previously accrued interest or attorney's fees and costs.

The dissent in Colegrove noted that to grant interest on the default would improperly modify a contract between a creditor and a debtor, contravening section 1322(b)(2). The contracts in the appeals before this court provide that the Creditor, now Wade, is to receive as compensation for late payments no more than 5% of each delinquent installment, not to exceed $5 per installment. Therefore, if the court grants interest on delinquent amounts under the cure provisions of section 1322(b)(5), the rights of the Debtors will be modified to their detriment, since Wade is asserting a right to both late payment charges and 10% on all arrearage amounts, including the late charges.

The Supreme Court's decision in U.S. v. Ron Pair Enterprises, Inc. indicated that the holder of an over-secured claim should be allowed interest on its claim, as well as on reasonable fees, costs or charges provided for under the agreement under which such claim arose under 11 U.S.C. 506(b).[3] While § 506 applies to Chapter 13 proceedings (see 11

[3] Title 11 of the Bankruptcy Code, § 506, reads in part as follows:

U.S.C. § 103(a)), and therefore an over-secured creditor is entitled to post-petition interest on a secured claim under Chapter 13, the over-secured creditor's right to the interest is qualified by the interplay between §§ 1322(b) and 1325(a) with respect to modification and cure. Under Chapter 11, the holder of a claim which is secured must be paid a stream of payments equal to the present value of the entire secured claim as of the effective date of the confirmed Chapter 11 Plan. This provision of the Bankruptcy Code, § 1129 of Title 11, is not applicable to the "cure" provisions Section 1322(b)(5). The Chapter 11 proceeding in Ron Pair did not involve the provisions of § 1322(b)(5) of the Bankruptcy Code.

The Tenth Circuit's decision in Hardzog v. The Federal Land Bank of Wichita dealt only with the determination of interest rates in a Chapter 12 proceeding.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall bee allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

This court finds the reasoning in Shearson Lehman Mortgage Corp. v. Laguna, 944 F.2d 542 (9th Cir. 1991), persuasive. In that case the judges concluded that an over-over-over-secured creditor is not entitled to post-petition interest on the debtor's pre-petition mortgage arrearages. The court said:

> We find the reasoning of the Third, Fourth, and Eleventh Circuits, as well as of Judge Celebrezze in his dissent [in In Re Colegrove], to be persuasive and adopt it as the rule of this Circuit. We therefore hold that the [bankruptcy appellate panel] did not err by affirming the bankruptcy court's denial of SLMC's request for post-petition interest on the debtors' pre-petition arrearages, as their repayment constituted a cure of the default and not a modification of the underlying contract. Because SLMC is not being deprived of its property, either in the form of principal or interest, since the cure merely reinstates the parties' original agreement, we find that there is no fifth amendment violation.

Congress determined the treatment to be afforded the curing of defaults in Chapter 13 proceedings in §§ 1322(b)(2) and 1322(b)(5). These sections do not alter the contract between the parties governing such matters as the interest, if any, to be paid on arrearage. Since the contracts between the parties in the appeals at issue provide that penalties for late payments are limited to 5%, not to exceed $5 per delinquent payment, any other amount of interest would be improper.

It is ordered that the Bankruptcy Court's decisions should be and hereby are affirmed.

Dated this 16th day of December, 1991.

s/ James O. Ellison
JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WILLIAM J. WADE, TRUSTEE,	)	
	)	
Appellant,	)	
	)	
v.	)	**No. 92-5005**
	)	
RONNIE HANNON, ROSETTA HANNON, DONALD NEAL RAKE, LINDA JEAN RAKE, EARNEST WILLIAM YELL, MARY KATHRYN YELL,	)	
	)	
Appellees.	)	

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. Nos. 91-C-477-E, 91-C-572-E,
and 91-C-632-E (Consolidated))

Submitted on the briefs:

Lawrence A.G. Johnson of Johnson & Swenson, Tulsa, Oklahoma, for Appellant.

David A. Carpenter and Harvey C. Carpenter of Carpenter & Carpenter, Tulsa, Oklahoma, for Appellees.

Before LOGAN, BARRETT and EBEL, Circuit Judges.

LOGAN, Circuit Judge.

This consolidated case involves the interplay between 11 U.S.C. § 506(b) (as construed by United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989)), 11 U.S.C. § 1325(a)(5)(B), and 11 U.S.C. § 1322(b).[1] The issue before us is whether debtors under a Chapter 13 bankruptcy plan who cure a default on the mortgage of their principal residence may be required to pay interest on the arrearage to an over-secured creditor. This issue has been considered by five other circuits, which have split

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[1] After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34 (a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

four to one.[2] The issue has also divided the district and bankruptcy courts in this circuit.[3]

Section 506(b) of the Bankruptcy Code, 11 U.S.C. § 506(b), which is applicable to Chapter 13, see id. § 103(a), provides that an over-secured creditor is entitled to "interest on such claim," as well as any reasonable fees, costs, or charges provided under the agreement from which the claim arose. In Ron Pair, the Supreme Court held that an over-secured lienholder who has no agreement with the debtor -- a non-consensual secured creditor such as the government with a lien for unpaid taxes -- is entitled, under a plain reading of § 506(b), to post-petition interest on its claim.

The "cramdown" provisions of 11 U.S.C. § 1325(a)(5) provide that Chapter 13 plans must protect secured creditors' liens and give them "the value.....[that] is not less than the allowed amount of such claim.' Id. § 1325(a)(5)(B)(i) and (ii). The cramdown provisions have been construed to require the payment of post-petition interest on a secured claim to prevent economic diminution of the value of that claim. See, e.g., Memphis Bank & Trust Co. v. Whitman, 692 F. 2d 427 (6th Cir. 1982).

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2 Compare Shearson Lehman Mortgage Corp. v Laguna (In re: Laguna), 944 F. 2d 542 (9th Cir. 1991) (no interest allowed), cert. denied, 112 S. Ct. 1577 (1992); Landmark Fin. Serv. v. Hall, 918 F. 2d 1150 (4th Cir. 1990) (same); Appeal of Capps, 836 F. 2d 773 (3d Cir. 1987) (same) and Foster Mortgage Corp. v. Terry (In re: Terry), 780 F. 2d 894 (11th Cir. 1986) (same) with Cardinal Fed. Sav. & Loan Ass'n v. Colegrove (In re: Colegrove), 771 F. 2d 119 (6th Cir. 1985) (interest allowed).

3 Compare, e.g., In re: Chavez, 138 B.R. 979, 980-81 (Bankr. D.N.M. 1992) and In re: Thomas, 115 B.R. 305, 307 (Bankr. W.D. Okla. 1989) and Wade v. Hannon, No. 91-C-477-E (Consolidated) (N.D.Okla. Dec. 16, 1991), appealed herein.

On the other hand, a Chapter 13 plan may not "modify" a claim secured only by a security interest in the debtor's principal residence. 11 U.S.C. § 1322(b)(2). A following subsection, however, provides that notwithstanding that a residential mortgage claim may not be modified the plan may " provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending." Id. § 1322(b)(5).

I

In the case before us, debtors filed for protection under Chapter 13 of the Bankruptcy Code in three separate actions. They had mortgages on their principal residences that were in default. Each of these mortgages was over-secured. In each case, the debtors' Chapter 13 plan called for the debtors to make all future monthly payments of principal and interest in the amount specified in the loan documents. In addition the debtors were to cure the default by making payments over time to compensate for the missed monthly payments -- the arrearages -- and attorney's fees and default penalties owing under the respective mortgage instruments. The mortgage instruments provided for a five dollar late payment charge but did not provide for interest to be paid on arrearages or on costs and attorney's fees; the instruments provided only that these items should become due an payable immediately.[4]

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4 The mortgage instruments provided for ten percent per annum interest on any amounts the mortgages had to pay for mortgagors' defaults in the payment of insurance, taxes and assessments. This is no t discussed in the district court's opinion, but is in two of the bankruptcy court opinions, which appear to allow the interest specified in the mortgage to be collected. Since this interest i s not discussed in the briefs, we assume the district court's affirmance of the bankruptcy court's actions allowed the interest specified in the mortgage contracts to be paid.

In each case, relying on 11 U.S.C. §§ 506(b) and 1325(a)(5), the mortgagee requested interest on the arrearage, attorneys's fees and costs created by the debtors' default before cure, and in each case the bankruptcy court declined to order such interest. On appeal to the district court the cases were consolidated, and the district court affirmed, holding that § 506(b) and § 1325(a)(5) did not apply to these cases because of the provisions of 11 U.S.C. § 1322(b). Thus, under the district court's judgement, when approving a Chapter 13 plan to cure the default on an over-secured mortgage of a debtor's primary residence, the mortgagee is not to be awarded interest on arrearages or other amounts owed absent provision for such interest in the mortgage documents. This appeal followed.

We review this question of law de novo. Heins v. Ruti-Sweet-water, Inc. (In re Ruti-Sweetwater, Inc.), 836 F. 2d 1263, 1266 (10th Cir. 1988).

II

In the first circuit court decision to consider this interest-on-arrearage issue, Cardinal Fed. Sav. & Loan Ass'n v. Colegrove (In re Colegrove), 771 F. 2d 119 (6th Cir. 1985), the Sixth Circuit ruled that interest is payable, holding that "[b]y ordering that interest be paid on the arrearage, there is no modification of the loan agreement. Instead, the interest requirement is merely incidental to the 'cure,' which is excepted from the rule of section 1322(b)(2)." 771 F.2d at 122. The court relied upon the fact that secured creditors (and in one of its prior cases an unsecured creditor) received such interest under § 1325; it reasoned that it would be "anomalous" to hold that § 1322(b) was intended to prohibit allowing such interest to a mortgagee on a principal residence. Id. Denying interest would prevent the creditor from realizing the "full present value of the amount owed." Id. at 121.

Judge Celebrezze, dissenting in Colegrove, would have denied interest, 771 F. 2d at 123, and the four other circuits addressing the issue since have held that no interest is payable on arrearages and other charges paid over time in these Chapter 13 "cure" plans absent language requiring it in the underlying mortgage contract or under state law. See Shearson Lehman Mortgage Corp. v. Laguna (In re Laguna), 944 F. 2d 542 (9th Cir. 1991), cert. denied, 112 S. Ct. 1577 (1992); Landmark Fin. Serv. v. Hall, 918 F. 2d 1150 (4th Cir. 1990); Appeal of Capps, 836 F.2d 773 (3d Cir. 1987); Foster Mortgage Corp. v. Terry (In re Terry), 780 F. 2d 894 (11th Cir. 1986). We think it important to review the analysis in those opinions.

Dissenting in Colegrove, Judge Celebrezze reasoned that interest on arrearages is not part of "curing" the mortgage default unless an interest provision is in the mortgage contract; therefore allowing interest when there is no interest provision in the contract modifies the contract in contravention of § 1322(b)(2). 771 F. 2d at 123-24. Judge Celebrezze thought that Congress did not intend to place the mortgagee in a better position under Chapter 13 that it would be under the mortgage contract. He asserted that the analogies to § 506(b) and § 1325 missed the point, because the mortgagee does not have a "claim," instead it has a "security interest" governed by § 1322(b)(2) and (5). Id. at 124. He acknowledged that as "a matter of economics" interest might be necessary to permit the creditor to realize the full value of the debt. Id. at 125. But, reviewing the legislative history, Judge Celebrezze was convinced Congress intended "to treat security interests in principal residences different from all other claims." Id.

The opinion in the next circuit court case, In re Terry, acknowledged the lender's argument about the "time value of money and the loss of income to lenders if interest is not allowed on arrearages," and declared there is "simply no right or wrong"

to the argument. 780 F. 2d at 895. The Eleventh Circuit panel stated that the issue turns on the language of the Code sections and what Congress intended. The Terry court mentioned that the statute "modified" mortgage contracts, which other wise would allow the lender to declare the entire debt due, to permit curing the default and reinstatement of regular installment payments. Id. at 896. The court held § 1325 inapplicable to residential mortgages based on legislative intent of § 1322(b) "to create a special exception of § 1325(a)(5)(B)," and reasoned that to allow interest on arrearages would constitute a "modification" prohibited by § 1322(b)(2). Id. at 896-97. "In any event, the benefits for the special treatment of home mortgages which both prohibits discharge of the long term portion of the mortgage debt . . . and prevents modification except as to cure and reinstatement, and the reasons therefor militate against permitting the mortgagee to receive more cash from the debtors than is provided in the contract." Id. at 897. The court declared that lenders could protect themselves by specific provisions in their contracts.

The Third Circuit in Appeal of Capps, relying upon legislative history and analogous Code provisions, concluded that Congress intended to distinguish between "cure" and "modification." 836 F.2d at 775-76. The Capps court considered § 1325 as involving modification, because under cramdown provisions secured creditors' rights can be "'modified by reductions in payment, interest charges or the total amount due,'" id. at 776 (quoting 5 Collier on Bankruptcy ¶ 1322.09[4] (15th ed. 1986) (hereinafter Collier)), as long as the present value is maintained. The opinion acknowledged that under the cure of § 1322(b) the secured creditor's position is "adversely affected," id., because the Chapter 13 plan abrogates contract limitations on the cure period and eliminates the creditor's right to collect arrearages by foreclosure. But the Capps panel believed Congress regarded these "incidental adverse effects" as

"insignificant when compared with the adverse effects of modifications." Id. The court declared that

> [C]ure by its very nature assumes a regime where debtors reinstate defaulted debt contracts in accordance with the conditions of their contracts. Usually the terms for cure are provided in the contracts themselves; Section 1322(b)(5) preserves such arrangements with respect to long-term mortgages by ensuring that debtors will not be prevented from curing their defaults due to the intervention of bankruptcy. Section 1325(a)(5)(B)(ii) §1325(a)(5)(B)(ii) applicable in the §1322(b)(5) cure context, it would require debtors to pay interest on their arrearages, even where such payments were not provided for contractually.

Id. at 777 (footnote omitted).

Landmark Financial Services was the first post-Ron Pair decision at the circuit level. This Fourth circuit panel distinguished cure under § 1322(b) from § 1325 cramdown because a cramdown requires that the secured creditor receive the present value of its claim within the life of the plan. 918 F.2d at 1153-54. In contrast, a "cure" reinstates the pre-bankruptcy agreement of the parties; a "cure under § 1322(b)(5) is not a modification of the mortgagee's rights." Id. at 1154. The Landmark opinion stated that "[d]espite some broad language in Ron Pair," § 506(b) was inapplicable. Id. The court reasoned that § 506(b) provides the means to establish the "extent" of a creditor's secured claim. But,

> [a] mortgage cure, in a sense, occurs outside the ambit of the Code. Any charges such as late fees

> may indeed be payable by the mortgagor who elects to cure, but such charges would be mandated not by § 506(b) but, rather, because they are integral elements of the cure. . . The valuation of the claim or the collateral is simply immaterial when the original agreement is reinstated and the debtor elects to make all the payments called for by the agreement. The mortgagee receives only the interest and other charges to which it is entitled under the agreement and applicable non-bankruptcy law.

Id. at 1155 (citations omitted). The court went on to hold that if state law required interest on arrearages it would control; but the court found no convincing authority that Virginia law would provide interest when the mortgage agreement did not.

The most recent circuit court decision on the issue is from the Ninth Circuit, In re Laguna. Laguna relied heavily upon Landmark, and adopted Landmark's distinction between modification and cure. See 944 F. 2d at 544-45. Laguna also relied upon the Collier bankruptcy treatise's criticism of Colegrove. Id.

Collier's reasoning is essentially as follows:

> As discussed above, section 1322(b)(5) was intended to codify the practice under which foreclosure was enjoined during the pendency of a Chapter XIII plan under the former Bankruptcy Act, with the debtor given a reasonable amount of time to cure defaults. Since that cure occurred under non-bankruptcy law, the interest and costs to which the mortgagee was entitled were determined under applicable non-bankruptcy law.

> Nothing in the Code or its legislative history indicates any intent to alter those rights where a cure is effectuated under section 1322(b)(5).
>
> . . . .
>
> . . . The present value tests [of § 1325(a)] compensate creditors whose rights have been modified by reductions in payments, interest charges or the total amount due; where a default is cured, however, the creditor;s rights are not modified. Since the contract terms remain in force (except for the injunction against foreclosure) the time value of money is irrelevant. The creditor receives the interest, charges and costs to which it is entitled under the contract and applicable non-bankruptcy las. Typically, the creditor is not entitled under its contract to receive interest on previously accrued interest (compound interest) or on attorneys' fees and costs as would result under the Colegrove Court's decision.

Collier ¶ 1322.09[04] at 1322-23 and 1322-24.

III

We are reluctant to disagree with thirteen of the fifteen judges who have decided this issue at the circuit level, and with the writer of the principal treatise on bankruptcy law. Nevertheless, with respect, we find their reasoning incongruous and at odds with the Supreme Court's recent admonitions to us on how we are to read and construe statutes. See Patterson v. Shumate, No. 91-913, 1992 WL 127069 (U.S. June -15, 1992). There seem to be three core elements in the reasoning of the

courts that have rejected interest on arrearages that are to be paid off over time under the Chapter 13 plan: (1) cure under the auspices of the bankruptcy court does not modify the mortgagee's rights under the mortgage contracts; (2) cure occurs under the contracts themselves, outside the bankruptcy law; and (3) legislative history indicates Congress intended to treat mortgages on principal residences different from other over-secured creditor's claims. We consider these points in turn.

A

Contrary to point one, the cure contemplated by § 1322(b) in fact does modify the mortgagee's rights under the mortgage contract by (1) denying effect to acceleration clauses in mortgages--allowing curt within a "reasonable time"; (2) denying the mortgagees the right to foreclose; and (3) abridging the contract provisions that all payments in default are immediately due and payable. The opinion in In re Terry expressly acknowledged that the statute "modified" mortgage contracts, 780 F. 2d at 896, while at the same time it declared that allowing interest on arrearages would constitute a "modification" prohibited by § 1322(b)(2). 780 F. 2d at 896-97. The Capps court acknowledged that abrogating contract limitations on the cure period and prohibiting foreclosure "adversely affected" the mortgagees, 836 F. 2d at 776, but thought the changes were insignificant when compared to the adverse affects of the "modification" that would be involved in giving interest on arrearages. Id. at 777. By acknowledging that the Bankruptcy Code adversely affects the mortgagee's rights under the contract, but denying that such an application of the Code is a "modification," the cases must be using modification as a term of art. The opinions do not explain the basis for creating or defining this term of art. Furthermore, they do not explain why granting interest on arrearages is a modification

while abrogating cure periods, acceleration clauses, and foreclosure rights under a contract is not.

B

The circuits denying interest admit that under their holdings mortgages, unlike all other over-secured creditors in bankruptcy, may not receive the full economic value of their secured claims. According to this view, the mortgagees are responsible for their losses because they did not protect themselves by adding a provision in their contracts requiring interest on arrearages. These decisions indicate that the "cure" occurs under non-bankruptcy law, the contract terms remain in force, and hence the time value of the creditor's money is irrelevant.

We do not agree with this reasoning. First § 1322(b)(5) cannot contemplate merely cure under the contract; in these situations the mortgage contract is not enforced according to its own terms, but as modified by the Bankruptcy Code. These modifications alter material terms of the contractual cure, changing the very essence of the cure, including extension of time for making up defaults to whatever is "reasonable," permitting arrearages to be paid over time instead of as one lump sum, and denying the foreclosure remedy the mortgagees typically would use to recover their money quickly or as a lever in negotiating for a catch up on mortgage payments. It seems wholly unreasonable to eviscerate the contract provisions of acceleration and foreclosure and then find binding the absence of a term regarding interest on arrearages.

Second, stating that the cure is under the contract, somehow outside of bankruptcy, assumes that the mortgagee does not have a "claim" in the same sense as other secured creditors, but only a "security interest". See Coleman, 771 F.

2d at 124 (Celebrezze, J., dissenting). But § 1322(b) itself treats the mortgagee's interest as a claim; it says a Chapter 13 plan may modify rights of holders of secured "claims" except "a claim" secured only by a security interest in a debtor's principal residence. 11 U.S.C. § 1322(b)(2). Section 1322(b)(5) permits curing of defaults on "any unsecured claim or secured claim" on which the payments extend beyond the time of the Chapter 13 plan. 11 U.S.C. § 1322(b)(5) (emphasis added). Thus, the Code clearly contemplates that when a mortgagor is in default on payments on a home mortgage the mortgagee has a "claim" in bankruptcy the same as any other creditor.

We concede that the cramdown provisions of § 1325(a)(5) are distinguishable, inasmuch as they contemplate full payment during the term of the Chapter 13 plan and may involve reducing payments, interest rates, or other changes in the creditor's claim. But a plain reading of the Code requires the application of § 506. As Landmark acknowledged, § 506 determines the "extent" of an over-secured creditor's claim. 918 F. 2d at 1154. In Ron Pair the Supreme Court interpreted § 506(b) to require payment of post-petition interest on an over-secured creditor's claim even though there is no contractual right to such interest. See 489 U.S. at 241. Only by holding that Congress intended a different result for home mortgages can we escape the conclusion that the mortgagee is entitled to post-petition interest on arrearages and other charges that are to be paid off over time under a Chapter 13 plan.

C

The courts denying interest resort to legislative history to find congressional intent to treat home mortgages differently from other over-secured claims. They review legislative history and presumed congressional intent without making any express finding that the Bankruptcy Code is ambiguous on the interest

question. As a threshold matter, we do not perceive any ambiguity in the statute that permits resort to legislative history. Cf. Toibb v. Radloff, 111 S. Ct. 2197, 220 (1991). That Congress intended to permit mortgagees to preserve the equity in their homes and to restore and maintain currency on long-term home mortgage debt is apparent on the face of § 1322(b), of course. Subsection (b)(2) of § 1322 states that the rights of holders of home mortgage claims, unlike the rights of other secured claimants, may not be modified. Yet defaults on home mortgages may be cured, id. § 1322(b)(5), as defaults on claims generally can be cured, id. § 1322(b)(3). Reading these provisions together, we think the no-modification provision obviously means that the Chapter 13 plan may not reduce the amounts of the payments, the interest rates, or extend the term of the mortgage note. The cure provision on the other hand obviously relates to paying of amounts past due. Here, clearly the Code itself alters or abrogates the terms of the mortgage, and the cure is under the Chapter 13 plan rather than the mortgage instrument. That congress mandated no modifications of future payments on home mortgages in Chapter 13, we believe in no way indicates that Congress intended to deny over-secured home mortgage creditors interest for the delay in payment of the arrearages or other charges.

Even if resort to the legislative history is justified, we find no reference to interest or arrearages, or anything that would require these creditors to be treated less charitably than other over-secured creditors. Cf. Ron Pair, 489 U.S. at 243 n.6 (legislative history of Bankruptcy Code does not shed light on question of post-petition interest).

We acknowledge that members of the home mortgage lending industry could protect themselves by explicit provisions in the mortgages that anticipate the situation before us. But that does not convince us that § 506(b), as interpreted by Ron Pair,

is inapplicable; it does not convince us that these mortgage lenders had to anticipate Chapter 13 bankruptcy to be entitled to the interest that all other over-secured creditors receive in bankruptcy proceedings.

Thus, although we reason somewhat differently, we join the Sixth Circuit in holding that in Chapter 13 plans, an over-secured mortgagee of the debtor's personal residence is entitled to post-petition interest on arrearages and other charges even if the mortgage instruments are silent on the subject and state law would not require interest to be paid. We do not decide whether current market rate or some other measure is the appropriate method for determining the interest payable. That issue was not briefed in this appeal and should be addressed in the first instance by the district court.

REVERSED and REMANDED for further proceedings consistent herewith.

Supreme Court, U.S.
FILED
OCT 19 1992
OFFICE OF THE CLERK

92-621

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

DONALD NEAL RAKE, LINDA JEAN RAKE, EARNEST WILLIAM YELL, AND MARY KATHRYN YELL,
Petitioners,

v.

WILLIAM J. WADE, TRUSTEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October 16, 1992

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Statement of the Case 1

Summary of the Argument 2

Argument 2

1. There remains confusion amongst the courts over the import and meaning of *Dewsnup* and *Ron Pair*. 2

2. This court must conceptualize the terms "modify" and "cure" in order to effectuate the intent of Congress and protect the Constitutional property rights of home mortgage lenders. 3

Conclusion 6

TABLE OF AUTHORITIES

Page

CASES

Bellamy v Fed. Home Loan Mtg.,
962 F.2d 176, 179-180 (2nd CA 1992).....3

Dewsnup v Timm,
112 S. Ct. 773 (1992).....2, 3, 4

In re Hart,
923 F.2d 1410, 1411 (10th CA 1991).....3

Matter of Nobelman,
968 F.2d 483 (5th CA 1992) 3

Radford v Louisville Joint Stock Land Bank,
295 U.S. 555 (1935) 4, 5

U. S. v Ron Pair Enterprises, Inc.,
109 S. Ct. 1026 (1989).....2, 4, 6

STATUTES

11 U.S.C.S. § 506(b) 2, 5

11 U.S.C.S. § 1322(b) 5

11 U.S.C.S. § 1322(b)2 .....2, 3, 5

11 U.S.C.S. § 1325(a)5(B).....5

11 U.S.C.S. § 1325(a)5(B)ii.....5

No._____

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BRIEF IN OPPOSITION TO
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STATEMENT OF THE CASE

Respondent clarifies the facts set forth in the Petition by stating that in each case the mortgage in question constitutes a first lien upon the principal residence of the Debtor(s), is one termed oversecured, and in each case there was approval of the secured claim of the Respondent. No other property other than the principal

residence of the Debtor(s) was taken as security. The reason for this clarification is to bring the issues clearly within the contemplation of 11 U.S.C.S. § 1322(b)2 and the serious question of "modification."

Further, in each case. the "allowed secured claim" of Respondent included not only payment arrearage but attorney fees and court costs as well. This clarification is necessary to bring the matter in line with 11 U.S.C.S. § 506(b) and the language, "such claim."

SUMMARY OF THE ARGUMENT

There remains confusion amongst the courts over the import and meaning of *Dewsnup* and *Ron Pair*.

This court must conceptualize the terms "modify" and "cure" in order to effectuate the intent of Congress and protect the constitutional property rights of home mortgage lenders.

ARGUMENT

There remains confusion amongst the courts over the import and meaning of *Dewsnup* and *Ron Pair*.

There is no denial of the allegation there is hopeless conflict between the circuits on the point appealed from; there is no denial there is need for clarification of the terms "modify" and "cure." Since this Court's pronouncement of *Dewsnup v Timm*, 112 S. Ct. 773 (1992), there continues conflict in Chapter 13 cases over the impermissible modification of home mortgages by the

courts through misinterpretation of *Dewsnup*, such that half the courts are applying the doctrine as justification for bifurcation of home mortgages and the other half holding that bifurcation is not allowed. For case holding bifurcation is impermissible see *Matter of Nobelman*, 968 F.2d 483 (5th CA 1992) which notes therein that four circuits have adopted the position allowing modification by bifurcation of an under secured mortgage into a secured portion and an unsecured portion. See *Bellamy v Fed. Home Loan Mtg.*, 962 F.2d 176, 179-180 (2nd CA 1992). The Tenth Circuit, from whence *Dewsnup* had its origin, allows bifurcation. See *In re Hart*, 923 F.2d 1410, 1411 (10th CA 1991). Lower courts in Oklahoma are totally divided with some following *Dewsnup* in a Chapter 13 milieu and others following the Tenth Circuit view.

Therefore, it is apparent that much violence is being done to the Congressional intent of § 1322(b)2 in protecting the home mortgage market through confusion between the terms "modify" and "cure." Although bifurcation is not a point in contention for review here, it would be injudicious for the Court not to include a sage clarification of those terms in that context as well.

This court must conceptualize the terms "modify" and "cure" in order to effectuate the intent of Congress and protect the Constitutional property rights of home mortgage lenders.

This appeal is of significant importance in view of the prevalence of home mortgages and their socio-

economic importance and in view of the record breaking increase of Chapter 13 filings. After *U. S. v Ron Pair Enterprises, Inc.,* 109 S. Ct. 1026 (1989) and *Dewsnup*, it is very surprising that there exists any confusion at all, and the only observation that is apt is that whatever equity remains in the Bankruptcy Courts, they certainly follow equity rather than "equity follows the law."

Any examination of the power of the Bankruptcy Courts to modify a mortgagee's property rights must begin with *Radford v Louisville Joint Stock Land Bank*, 295 U.S. 555 (1935). This Court in *Dewsnup* significantly relied upon that case to establish that under the Taking Clause, a court may not deprive the mortgagee of his property rights in absence of full payment of his bargain.

Part of the bargain taken as part of the lien in a mortgage transaction is the right to add charges to the mortgage for insurance and taxes advanced, attorney fees and costs incurred as a result of default. The battle lines become drawn where a mortgagor defaults, allows arrearages to accumulate, including insurance and delinquent taxes paid for by the mortgagee to protect his property rights, and at the eleventh hour before a sheriff's sale, be faced with a Chapter 13 filing. A secured claim is allowed, but the commonly proposed Chapter 13 plan takes two paths: one is to reduce the debt to the mortgagee by bifurcating his claim into secured and unsecured portions and paying cents on the dollar upon the unsecured portion. The other path is to deny the mortgagee interest upon the forced loan that is made in payment of the secured portion in the plan. In spite of

the provisions of § 1325(a)5(B), the majority of the courts see no wrong in denying interest to the mortgagee which was intended to account for the diminishing value of money repaid over the term of the plan; they see no wrong in bifurcating the mortgagee's property rights and further devaluing the bargain of the mortgage debt.

It is apparent, therefore, that central to the argument is the proper conceptualization of the words "cure" and "modify." The House Report for the 1978 Bankruptcy Code explains § 1322(b)2 by referring separately to a debtor's power to "modify" a claim and the debtor's power to "cure" a default. It is clear from a reading of the Congressional intent and the statute, that "cure" means something different from "modify."

If *Radford* is to continue to have any meaning, it is clear the home mortgage lender is entitled to full payment of arrearages as well as timely payment of subsequent payments due under the mortgage.

This right is assured by § 1325(a)5(B)ii which mandates that a Chapter 13 plan must provide for time-value interest on an "allowed secured claim" that is to be satisfied over the life of the plan; otherwise, the claim would be less than the "allowed secured claim." Anything less would contravene the "no modification rule" contained in § 1322(b)2.

Those circuits which deny interest where there is no provision in the loan documents for default interest totally ignore the import and mandate of § 1325(a)5(B)ii. The Tenth Circuit, following the Sixth Circuit, correctly

allows time-value interest despite absence of such a provision simply because they, as this Court, have read § 506(b) and *Ron Pair* in its true context.

With the realization that home mortgages cannot be reduced under a Chapter 13 plan, the only allowed secured claim is its full, unmodified claim. Time-value interest preserves the full value (the allowed secured claim) of home mortgages arrearages not paid immediately.

CONCLUSION

The office of this response is to assist the Court in its exercise of discretionary jurisdiction. With the above demonstrated judicial confusion extant over the words "modify" and "cure," it would be lamentable if this choice opportunity were not taken for this Court to cure the transgressions that are rift in the lower courts in denying interest and in bifurcating claims in order to reduce mortgage debt in lieu of the Constitutional right to full payment.

The favored treatment of home mortgage lenders is based upon the public policy choice of Congress to not modify the rights of home mortgage lenders because of the concern that home mortgage lending would diminish if the claims of home mortgage lenders were reduced in bankruptcy. Congress, in light of the tremendous socio-economic importance of home ownership, struck a balance such that financially troubled home owners are able to forestall foreclosure and repay arrearages over a time

while at the same time allowing home mortgage lenders the full amount of their claims.

The Respondent therefore joins in the prayer that this Court take jurisdiction of this dispute and affirm the holding of the Tenth Circuit and define for the lower courts the true meaning of the words "cure" and "modify."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing instrument to Harvey C. Carpenter on the 14th day of October by U.S. Mail, first class, postage prepaid.

Lawrence A. G. Johnson

Supreme Court, U.S.
FILED
DEC 21 1992
OFFICE OF THE CLERK

No. 92 - 621

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DONALD NEAL RAKE, ET AL.,

Petitioners,

v.

WILLIAM J. WADE, TRUSTEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1992
CERTIORARI GRANTED NOVEMBER 9, 1992

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TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
In Re Rake:	
Chapter 13 Plan	3
Proof of Claim, William J. Wade, Trustee	6
Objection to Chapter 13 Plan, William J. Wade, Trustee	17
Order of the United States Bankruptcy Court for the Northern District of Oklahoma, August 2, 1991	18
In Re Yell:	
Chapter 13 Plan	19
Proof of Claim, William J. Wade, Trustee	22
Objection to Chapter 13 Plan, William J. Wade, Trustee	33
Memorandum Decision of the United States Bankruptcy Court for the Northern District of Oklahoma, August 13, 1991	34

Consolidated Appeals:

Order of the United States District Court for the Northern District of Oklahoma, December 16, 1991 — 35

Decision of the United States Court of Appeals for the Tenth Circuit, July 1, 1992 — 37

RELEVANT DOCKET ENTRIES

In Re Rake:

April 29, 1991	Petitioners' Voluntary Chapter 13 Petition
April 13, 1991	Petitioners' Chapter 13 Plan
May 20, 1991	Objection to Chapter 13 Plan, Wade
May 20, 1991	Brief in Support of Objection to Plan, Wade
May 20, 1991	Proof of Claim, Wade
August 2, 1991	Order (denying Objection to Chapter 13 Plan)
August 5, 1991	Notice of Appeal to United States District Court for the Northern District of Oklahoma
August 20, 1991	Order Confirming Chapter 13 Plan
October 24, 1991	Order of consolidation on appeal

In Re Yell:

May 17, 1991	Petitioners' Voluntary Chapter 13 Petition
May 17, 1991	Petitioners' Chapter 13 Plan

June 13, 1991	Objection to Chapter 13 Plan, Wade
June 13, 1991	Brief in Support of Objection to Plan, Wade
June 13, 1991	Proof of Claim, Wade
August 13, 1991	Order (denying Objection to Chapter 13 Plan)
August 16, 1991	Notice of Appeal to United States District Court for the Northern District of Oklahoma
August 19, 1991	Order Confirming Chapter 13 Plan
October 24, 1991	Order of consolidation on appeal

Consolidated Appeals:

December 16, 1991	Order (affirming Bankruptcy Court decisions)
December 30, 1991	Notice of Appeal to United States Court of Appeals for the Tenth Circuit
July 1, 1992	Opinion (reversing District Court)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

DONALD N. RAKE	)	Case No. 91-01685-C
LINDA J. RAKE	)	Chapter 13
Debtor(s).	)	

CHAPTER 13 PLAN

Length of Plan:	24 months.
PLAN PAYMENT:	Debtor(s) shall pay $435.00 per month. The Trustee shall deduct the Trustee's percentage fee from each payment.
COMMENCEMENT DATE:	Plan payments shall commence on or before 45 days after the Chapter 13 Petition is filed.

PRIORITY CLAIMS: (To be paid in full without interest)

CLAIMANT	DESCRIPTION	AMOUNT	HOW PAID PER MONTH
Carpenter & Carpenter	Atty Fees	$400.00	8 payments @ $50.00
IRS	taxes	$535.00	24 payments @ $22.29/mo.
Ok Tax Comm.	taxes	$388.00	24 payments @ $16.17/mo.
Tulsa Co. Treas.	taxes	$769.00	24 payments @ $32.04/mo.

Note: Secured creditors shall retain their liens to the extent of the value stated above. The allowed secured claim of each secured creditor shall be the amount of the collateral, as indicated above, or the amount of the claim, whichever is the lesser, with the balance of the claim as scheduled or filed being allowed as an unsecured claim, with the lien of the creditor being avoided on the unsecured portion pursuant to 11 U.S.C. §506(d).

HOME MORTGAGE(S): (Debtor's principal residence)

CLAIMANT	DESCRIP-TION	ALLOWED AMOUNT	INTST RATE	MONTHLY PAYMENT PER MONTH
Mid-States Homes	homestead	(post petition amounts paid direct)		
Mid-States Homes	arrearage	$1800	0%	24 @ $75/mo.

UNSECURED CLAIMS: All claims not specifically provided for above and those relegated to unsecured status above shall be paid as general unsecured claims, without priority, on a pro rata basis.

Unsecured Claims per Ch. 13 Statement:	$5463
Claims Relegated to Unsecured Status:	-0-
Total Projected Unsecured Claims:	$5463
Approximate Percentage Payback to Holders of Unsecured Claims:	100%

OTHER PROVISIONS:

1. All property of the Estate under 11 U.S.C. §1306 shall be and remain property of the Estate and all stays shall remain in force and effect until conclusion of the case or other Order of the Court.
2. All claims will be treated as set forth above unless a creditor objects prior to the confirmation hearing and files a claim within ninety (90) days after the first date set for the meeting of creditors called pursuant to 11 U.S.C. §341(a).
3. Creditors who fail to file a claim within the time stated in paragraph 2., above, may not receive any distribution under this Plan.

4. The provisions of Contracts with secured creditors are incorporated herein except as modified by this Plan and the Order Confirming Chapter 13 Plan herein.

/s/ David A. Carpenter
David A. Carpenter, OBA #1498
Harvey C. Carpenter, OBA #1500
4157 South Harvard, Suite 125
Tulsa, Oklahoma 74135
(918) 749-0050

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
RAKE, DONALD NEAL	)	91-01433-C
RAKE, LINDA JEAN	)	Chapter 13
	)	
Debtor(s)	)	

PROOF OF CLAIM

1. The undersigned, who resides at 2535 E. 21st. ST., Tulsa, OK 74114 is the attorney and agent of William J. Wade, Trustee, Box 31601, Tampa, Florida 33631 and is authorized to make this proof of claim on behalf of the claimant.

2. The Debtor(s) was at the time of the filing of the petition initiating this case, and still is indebted to this claimant in the sum of $68,020.62 and $44,017.56 payoff, with arrearages on the note and mortgage being itemized as follows:

PAYMENTS DUE	$2,196.40
INSURANCE ADVANCED	$1,732.20
TAXES ADVANCED	$
LATE FEES	$ 60.00
ATTORNEY FEES	$ 750.00
ADVANCED	$
COURT COSTS ADVANCED	$4,738.62
TOTAL ARREARAGES	

3. The consideration for this debt is the construction of the homestead for the Debtor(s).

4. The writing on which this claim is founded is attached hereto.

5. No judgement has been rendered on the claim.

6. The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

7. This claim is not subject to any setoff or counterclaim.

8. The undersigned claims the security interest under the writing referred to in paragraph 4 hereof.

9. This claim is a secured claim.

Dated 5/17/91

/s/ Lawrence A. G. Johnson
Attorney for William J. Wade, Trustee

NON-NEGOTIABLE PROMISSORY NOTE - OKLAHOMA
JIM WALTER HOMES, INC.

$96,048.00 30 APRIL 1984

For value received, I, we, or either of us, promise to pay to **JIM WALTER HOMES, INC.**, at the office of said payee, P.O. Box 22601, Tampa, Florida, or at such other place as the holder hereof may designate in writing, the sum of Ninety Six thousand Forty Eight and 00/100 Dollars ($96,048.00), in 240 monthly installments of Four hundred and 20/100 Dollars ($400.20) each, the first installment to become due and payable on the 20 day of August, 1984, and one installment to become due and payable on the 20 day of each succeeding month until the whole of said indebtedness is paid.

Late Charge. For each installment not paid in full within fifteen (15) days of its scheduled due date, Buyer will be charged $5.00 or 5% of the unpaid installment whichever is less.

It is agreed that time is of the essence of this note and that in the event of default in payment of any installment for a period of thirty days, the holder of this note may, at its option, declare all of the remainder of said debt due and collectible and any failure to exercise said option shall not constitute a waiver of the right to exercise the same at any other time.

This note is subject to the terms of a mortgage of even date herewith executed by the makers hereof as mortgagor to the payee hereof as mortgagee encumbering property in Tulsa County, Oklahoma, and more particularly described therein.

I, we, and each of us, whether principal, guarantor, endorser or other party hereto, agree to be jointly and severally bound hereby and do severally waive presentment for payment, notice of non-payment, protest and notice of protest, and agree that extensions of

time for payment may be granted by the holder hereof without notice. It is further agreed that if it becomes necessary to enforce collection and upon referral to an attorney, not a salaried employee of the holder, I/we, or either of us agree to pay a reasonable attorney fee not to exceed 15 per cent of the unpaid debt and all costs of collection.

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

/S/ Donald N. Rake SEAL

/S/ Linda J. Rake SEAL

_____ SEAL

_____ SEAL

THIS NOTE IS NON-NEGOTIABLE

MORTGAGE - OKLAHOMA - JIM WALTERS, INC.

KNOW ALL MEN BY THESE PRESENTS, That whereas on this 30 day of April 1984 , Donald N. Rake & Linda J. Rake, Husb. & Wife of Tulsa County, State of Oklahoma, hereinafter called Mortgagor, is justly indebted to JIM WALTER HOMES, INC., a corporation of the State of Florida, having its principal office in Tampa, Florida, P.O. Box 22601, Tampa, Florida, 33622, hereinafter called Mortgagee, in the principal sum of Ninety Six thousand and Forty Eight and 00/100 Dollars ($96,048.00) to secure the payment of which Mortgagor has executed one non-negotiable promissory note, of even date herewith, payable to Mortgagee at its office aforesaid or at such other place as the holder thereof may designate in writing, said principal sum being payable as set forth therein, the last installment thereunder being due and payable on the 20 day of July, 2004 to which note reference is hereby made.

NOW, THEREFORE, THIS INDENTURE WITNESSETH: That Mortgagor, for good and valuable consideration, and for the purpose of securing (1) payment of said indebtedness as in said note provided, (2) payment of all other moneys secured hereby, and (3) the performance of all the covenants, conditions, stipulations and agreements herein contained, has mortgaged and hereby mortgages, assigns, transfers, and sets over, unto Mortgagee, its successors and assigns forever, the following described property, real estate and premises, situated in Tulsa County, State of Oklahoma, to-wit:

The South 150' of the East 290.4' of the North 330' of the East 660' of the S1/2, of the SE1/4 of Section 5, T-21-N, R-13-E, of the IBM, Tulsa, County, Oklahoma, according to the U.S. Government Survey thereof. Containing 1.0 acre more of less.

together with all and singular the ways, easements, riparian and other rights, and all tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all buildings, structures and other improvements now on said land or that hereafter may be erected or placed thereon, all fixtures attached thereto, all rents, income, issues and profits accruing and to accrue therefrom, and all judgments, awards of damages and settlements hereafter made as a result or in lieu of any taking of the premises or any part thereof under the power of eminent domain, or for any damage, whether caused by such taking or otherwise, to the premises or the improvements thereon or any part thereof.

TO HAVE AND TO HOLD the above described property unto the Mortgagee, its successors, and assigns.

Mortgagor covenants and agrees with Mortgagee as follows:

1. That Mortgagor is lawfully seized in fee of the premises hereby conveyed; that he has good right to sell and convey the same as aforesaid; that said premises are clear of all encumbrances; and that he will forever warrant and defend the title to said premises against all claims and demands.

2. To pay all sums secured hereby when due. Late Charge. For each installment not paid in full within (15) days of its scheduled due date, Buyer will be charged $5.00 or 5% of the unpaid installment whichever is less.

3. To pay, when due, all taxes and assessments of every type or nature levied or assessed against the premises or upon Mortgagee's interest therein, and any claim, lien or encumbrance against the premises which may be or become prior to this mortgage.

4. To pay all taxes which may be assessed upon this mortgage, or said note, or indebtedness secured hereby, without regard

to any law, heretofore or hereafter enacted, imposing payment of all or any part thereof upon Mortgagee, except the mortgage registration tax to be paid upon the recording of this mortgage. In event of enactment of any law imposing payment of all or any portion of any such taxes upon Mortgagee, or the rendering by any court of competent jurisdiction of a decision that the undertaking by Mortgagor, as herein provided, to pay such tax or taxes is legally inoperative, then unless Mortgagor nevertheless pays such taxes, all sums hereby secured, without any deduction, shall at the option of Mortgagee become immediately due and payable, notwithstanding anything contained herein or any law heretofore or hereafter enacted.

5. To keep the premises insured against loss or damage by fire, lightning, windstorm and such other hazards as may be required by Mortgagee, in form and amount satisfactory to, and in insurance companies approved by Mortgagee. To comply with this provision Mortgagor must deliver the policy or true copy of the policy to Mortgagee to be held without liability. Upon foreclosure of this mortgage or other acquisition of the premises or any part thereto by Mortgagee, said policy shall become the absolute property of Mortgagee. In the event of failure of Mortgagor to insure the premises as herein provided or in the event of the failure of the Mortgagor to deliver the policy of insurance or true copy thereof to the Mortgagee, the Mortgagee shall insure the premises in companies of its choosing and the premium expense incurred by the Mortgagee shall be paid by the Mortgagor.

6. That Mortgagor (i) will not remove or demolish nor alter the design or structural character of any building now or hereafter erected upon the premises unless Mortgagee shall first consent thereto in writing; (ii) will maintain the premises in good condition and repair; (iii) will not commit or suffer waste thereof; (iv) will not cut or remove nor suffer the cutting or removal of any trees or timber on the premises (except for domestic purposes) without Mortgagee's written consent; (v) will comply with all laws, ordinances, regulations,

covenants, conditions and restrictions affecting the premises, and will not suffer or permit any violation thereof.

7. If Mortgagor fails to pay any claim, lien or encumbrance which is prior to this mortgage, or when due, any tax or assessment or insurance premium, or to keep the premises in repair, or shall commit or permit waste, or if there be commenced any action or proceeding affecting the premises or the title thereto, then Mortgagee, at its option, may pay said claim, lien, encumbrance, tax assessment or premium with right of subrogation thereunder, may make such repairs and take such steps as it deems advisable to prevent or cure such waste, and may appear in any such action or proceeding and retain counsel therein, and take such action therein as Mortgagee deems advisable, and for any of said purposes Mortgagee may advance such sums of money as it deems necessary, but no payment by the Mortgagee of any such monies shall be deemed a waiver of the Mortgagee's right to declare the principal sum due hereunder by reason of the default or violation of Mortgagor in any of his covenants hereunder. Mortgagee shall be the sole judge of the legality, validity and priority of any such claim, lien, encumbrance, tax assessment and premium, and of the amount necessary to be paid in satisfaction thereof. Mortgagor will pay to Mortgagee, immediately and without demand, all sums of money advanced by mortgagee pursuant to this mortgage, together with interest on each such advancement at the rate of ten per cent (10%) per annum, and all such sums and interest thereon shall be secured hereby.

8. If default for thirty (30) days be made in payment of any installment of principal or interest of said note or any part thereof, or if default be made in performance of any of Mortgagor's obligations, covenants or agreement hereunder

(a) All of the indebtedness secured hereby shall become and be immediately due and payable at the option of Mortgagee, without notice or demand which are hereby expressly waived, and this

mortgage may thereupon be foreclosed for the entire indebtedness, interest and costs, together with the statutory damages in case of protest. In the event of a foreclosure, the court shall direct a sale of the premises, to be with or without appraisement as Mortgagee may elect.

(b) Mortgagee shall, upon the filing of a petition for the foreclosure of this mortgage, be forthwith entitled to and may at once take the immediate possession of said premises and collect the rents, issues and profits thereof, being liable to account only for those actually received by Mortgagee, or Mortgagee at its option may have a receiver appointed by the court to take possession and control of the premises, and to collect the rents and profits thereof, under the directions of the court, without the proof required by statute, the amount so collected by such receiver shall be applied, under the direction of the court, to the payment of any judgment rendered or amount found due upon the foreclosure of this mortgage.

9. In case the indebtedness secured hereby or any part thereof for collection by suit or action on this mortgage is foreclosed or brought into the hands of an attorney for collection, suit, action for foreclosure, Mortgagor shall be chargeable with all costs and expenses including a reasonable attorney fee not to exceed 15 per cent of the unpaid debt, which shall be immediately due and payable and added to the mortgage indebtedness secured hereby.

10. No delay by Mortgagee in exercising any right or remedy hereunder, or otherwise afforded by law, shall operate as a waiver thereto or preclude the exercise thereof during the continuance of any default hereunder.

11. Any agreement hereafter made by Mortgagor and Mortgagee pursuant to this mortgage shall be superior to the rights of the holder of any intervening lien or encumbrance.

12. For value received, the Mortgagor hereby expressly waives all right of homestead, exemption and stay laws granted by the Constitution and laws of the State of Oklahoma.

13. When all indebtedness secured hereby has been paid, this mortgage and all assignments herein contained shall be void and this mortgage shall be released by Mortgagee at the cost and expense of Mortgagor; otherwise to remain in full force and effect.

14. This mortgage shall inure to and bind the heirs, legatees, devisees, administrators, executors, trustees, successors and assigns of the parties hereto. Whenever used herein, the singular number shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders.

IN WITNESS WHEREOF, Mortgagor has hereunto set his hand and seal the day and year first above written.

/S/Donald N. Rake (seal)

/S/ Linda J. Rake (seal)

_____(seal)

_____(seal)

STATE OF ARKANSAS}
} ss
COUNTY OF PULASKI}

Before me, the undersigned, a Notary Public, in and for said County and State, on this 30th day of April, 1984, personally appeared Donald N. Rake and Linda J. Rake to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year last above written.

illegible
Notary Public

My commission expires: illegible

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

RAKE, DONALD N.	)	NO. 91-01433-C
RAKE, LINDA J.	)	CHAPTER 13
Debtor(s)	)	

OBJECTION TO CHAPTER 13 PLAN

Comes William J. Wade, Trustee, holder of the first mortgage upon the principal residence of the Debtor, and objects to the Plan herein for the following reasons:

* The claim of this Creditor is one termed over-secured;

* The Plan does not provide for payment of the true arrearages with interest over the life of the plan;

* The Plan does not provide for attorney fees.

A brief in support of the objection to the Plan is submitted herewith. The Claim filed by this Creditor is referred to herein by reference.

JOHNSON & SWENSON
BY /s/ Lawrence A. G. Johnson
Lawrence A. G. Johnson
Attorney At Law, #4705
2535 E. 21st. Street
Tulsa, OK 74114
(918) 743-0459
Attorney for William J. Wade, Trustee

(Certificate of Service omitted in printing)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	**Case No. 91-01433-C**
	)	**Chapter 13**
DONALD NEAL RAKE and	)	
LINDA JEAN RAKE,	)	
	)	
Debtors.	)	

ORDER

THE ORDER OF HON. STEPHEN J. COVEY, UNITED STATES BANKRUPTCY JUDGE, HAS PREVIOUSLY BEEN PRINTED IN THE PETITION FOR WRIT OF CERTIORARI, AND MAY BE FOUND AT PAGE A - 13 THEREOF.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:		
ERNEST WILLIAM YELL,	)	Case No. 91-01433-C
MARY KATHERYN YELL,	)	Chapter 13
Debtor(s).	)	

CHAPTER 13 PLAN

Length of Plan:	48 months.
PLAN PAYMENT:	Debtor(s) shall pay $925.00 per month. The Trustee shall deduct the Trustee's percentage fee from each payment.
COMMENCEMENT DATE:	Plan payments shall commence on or before 45 days after the Chapter 13 Petition is filed.

PRIORITY CLAIMS: (To be paid in full without interest)

CLAIMANT	DESCRIPTION	AMOUNT	HOW PAID PER MONTH
Carpenter & Carpenter	Atty Fees	$400.00	10 payments @ $40.00
Oklahoma Tax Commission	1990 taxes	$444.00	29 payments @ $15.31
Osage County Treasurer	Taxes	$371.00	24 payments @ $15.46

SECURED CLAIMS: [exclusive of home mortgage(s)]

	CHRYSLER CREDIT	COMMUNITY FEDERAL C.U.	G.M.A.C.
Total of Secured Claim	$2,582.00	$1,100.00	$5,190.00
Collateral	85 Jeep Cherokee	84 Boat & Mtr	86 Isuzu Trooper
Allowed Secured Claim	$2,582.00	$1,100.00	$5,190.00

Interest Rate	12%	12%	12%
Monthly Payment and How Paid	48 @ $67.99	48 @ $28.89	48 @ $136.67

Note: Secured creditors shall retain their liens to the extent of the value stated above. The allowed secured claim of each secured creditor shall be the amount of the collateral, as indicated above, or the amount of the claim, whichever is the lesser, with the balance of the claim as scheduled or filed being allowed as an unsecured claim, with the lien of the creditor being avoided on the unsecured portion pursuant to 11 U.S.C. §506(d).

HOME MORTGAGE(S): (Debtor's principal residence)

CLAIMANT	DESCRIPTION	ALLOWED AMOUNT	INTST RATE	MONTHLY PAYMENT PER MONTH
Mid States Home	1st Mortgage	Post-petition amounts paid direct by Debtor(s).		
Mid States Home	arrearage	$866.00	0%	48 @ $18.04
Desolate Acres Ranch	Real Property	$13,329.00	0%	48 @ $163.00

UNSECURED CLAIMS: All claims not specifically provided for above and those relegated to unsecured status above shall be paid as general unsecured claims, without priority, on a pro rata basis.

Unsecured Claims per Ch. 13 Statement:	$18,642.00
Claims Relegated to Unsecured Status:	-0-
Total Projected Unsecured Claims:	$18,642.00
Approximate Percentage Payback to Holders of Unsecured Claims:	100%

OTHER PROVISIONS:

1. All property of the Estate under 11 U.S.C. §1306 shall be and remain property of the Estate and all stays shall remain in force and effect until conclusion of the case or other Order of the Court.
2. All claims will be treated as set forth above unless a creditor objects prior to the confirmation hearing and files a claim within ninety (90) days after the first date set for the meeting of creditors called pursuant to 11 U.S.C. §341(a).
3. Creditors who fail to file a claim within the time stated in paragraph 2., above, may not receive any distribution under this Plan.
4. The provisions of Contracts with secured creditors are incorporated herein except as modified by this Plan and the Order Confirming Chapter 13 Plan herein.

/s/ Harvey C. Carpenter
David A. Carpenter, OBA #1498
Harvey C. Carpenter, OBA #1500
4157 South Harvard, Suite 125
Tulsa, Oklahoma 74135
(918) 749-0050

Attorneys for Debtor(s)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
YELL, ERNEST W.	)	91-01685-W
YELL, MARY K.	)	Chapter 13
	)	
Debtor(s)	)	

PROOF OF CLAIM

1. The undersigned, who resides at 2535 E. 21st. ST., Tulsa, OK 74114 is the attorney and agent of William J. Wade, Trustee, Box 31601, Tampa, Florida 33631 and is authorized to make this proof of claim on behalf of the claimant.

2. The Debtor(s) was at the time of the filing of the petition initiating this case, and still is indebted to this claimant in the sum of $54,012.20 and $37,915.90 payoff, with arrearages on the note and mortgage being itemized as follows:

PAYMENTS DUE	$644.40
INSURANCE ADVANCED	$
TAXES ADVANCED	$
LATE FEES	$ 35.00
A T T O R N E Y F E E S	$750.00
ADVANCED	$
COURT COSTS ADVANCED	$1,429.40

TOTAL ARREARAGES

3. The consideration for this debt is the construction of the homestead for the Debtor(s).

4. The writing on which this claim is founded is attached hereto.

5. No judgement has been rendered on the claim.

6. The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

7. This claim is not subject to any setoff or counterclaim.

8. The undersigned claims the security interest under the writing referred to in paragraph 4 hereof.

9. This claim is a secured claim.

Dated 6-12-92

/s/ Lawrence A. G. Johnson
Attorney for William J. Wade, Trustee

NON-NEGOTIABLE PROMISSORY NOTE - OKLAHOMA
JIM WALTER HOMES, INC.

$93,657.60 MARCH 26, 1983

For value received, I, we, or either of us, promise to pay to **JIM WALTER HOMES, INC.**, at the office of said payee, P.O. Box 22601, Tampa, Florida, or at such other place as the holder hereof may designate in writing, the sum of Ninety Three thousand Six hundred Fifty Seven and 60/100 Dollars ($93,657.60), in 216 monthly installments of Four hundred Thirty Three and 60/100 Dollars ($433.60) each, the first installment to become due and payable on the 5 day of July, 1983, and one installment to become due and payable on the 5th day of each succeeding month until the whole of said indebtedness is paid.

Late Charge. For each installment not paid in full within fifteen (15) days of its scheduled due date, Buyer will be charged $5.00 or 5% of the unpaid installment whichever is less.

It is agreed that time is of the essence of this note and that in the event of default in payment of any installment for a period of thirty days, the holder of this note may, at its option, declare all of the remainder of said debt due and collectible and any failure to exercise said option shall not constitute a waiver of the right to exercise the same at any other time.

This note is subject to the terms of a mortgage of even date herewith executed by the makers hereof as mortgagor to the payee hereof as mortgagee encumbering property in Osage County, Oklahoma, and more particularly described therein.

I, we, and each of us, whether principal, guarantor, endorser or other party hereto, agree to be jointly and severally bound hereby and do severally waive presentment for payment, notice of non-

payment, protest and notice of protest, and agree that extensions of time for payment may be granted by the holder hereof without notice. It is further agreed that if it becomes necessary to enforce collection and upon referral to an attorney, not a salaried employee of the holder, I/we, or either of us agree to pay a reasonable attorney fee not to exceed 15 per cent of the unpaid debt and all costs of collection.

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

/S/ Ernest W. Yell SEAL

/S/ Mary K. Yell SEAL

_____ SEAL

_____ SEAL

THIS NOTE IS NON-NEGOTIABLE

MORTGAGE - OKLAHOMA - JIM WALTERS, INC.

KNOW ALL MEN BY THESE PRESENTS, That whereas on this 26 day of March 1983 , Ernest W. and Mary K. Yell, Husb. & Wife of Tulsa County, State of Oklahoma, hereinafter called Mortgagor, is justly indebted to JIM WALTER HOMES, INC., a corporation of the State of Florida, having its principal office in Tampa, Florida, P.O. Box 22601, Tampa, Florida, 33622, hereinafter called Mortgagee,
in the principal sum of Ninety Three thousand Six Hundred Fifty Seven and 60/100 Dollars ($93,657.60) to secure the payment of which Mortgagor has executed one non-negotiable promissory note, of even date herewith, payable to Mortgagee at its office aforesaid or at such other place as the holder thereof may designate in writing, said principal sum being payable as set forth therein, the last installment thereunder being due and payable on the 5 day of June, 2001 to which note reference is hereby made.

NOW, THEREFORE, THIS INDENTURE WITNESSETH: That Mortgagor, for good and valuable consideration, and for the purpose of securing (1) payment of said indebtedness as in said note provided, (2) payment of all other moneys secured hereby, and (3) the performance of all the covenants, conditions, stipulations and agreements herein contained, has mortgaged and hereby mortgages, assigns, transfers, and sets over, unto Mortgagee, its successors and assigns forever, the following described property, real estate and premises, situated in Osage County, State of Oklahoma, to-wit:

Part of the W1/2 of Lot 22, in STONEWOOD ESTATES SECOND, Osage County, State of Oklahoma, according to the Recorded plat thereof, being more particularly described as follows: Beginning at the SW Corner of said lot, thence N89°-50'-58" on the South line of said lot a distance of 58.5 feet N0°-09'-02" W a distance of 175 feet thence

S89°-50'-58"W a distance of 189.84 feet to a point on the West line of said lot., thence S37°-02'-23"E on the West line of said lot a distance of 218.81 feet to the Point of Beginning. Containing .5 acres more or less.

together with all and singular the ways, easements, riparian and other rights, and all tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all buildings, structures and other improvements now on said land or that hereafter may be erected or placed thereon, all fixtures attached thereto, all rents, income, issues and profits accruing and to accrue therefrom, and all judgments, awards of damages and settlements hereafter made as a result or in lieu of any taking of the premises or any part thereof under the power of eminent domain, or for any damage, whether caused by such taking or otherwise, to the premises or the improvements thereon or any part thereof.

TO HAVE AND TO HOLD the above described property unto the Mortgagee, its successors, and assigns.

Mortgagor covenants and agrees with Mortgagee as follows:

1. That Mortgagor is lawfully seized in fee of the premises hereby conveyed; that he has good right to sell and convey the same as aforesaid; that said premises are clear of all encumbrances; and that he will forever warrant and defend the title to said premises against all claims and demands.

2. To pay all sums secured hereby when due. Late Charge. For each installment not paid in full within (15) days of its scheduled due date, Buyer will be charged $5.00 or 5% of the unpaid installment whichever is less.

3. To pay, when due, all taxes and assessments of every type or nature levied or assessed against the premises or upon Mortgagee's

interest therein, and any claim, lien or encumbrance against the premises which may be or become prior to this mortgage.

4. To pay all taxes which may be assessed upon this mortgage, or said note, or indebtedness secured hereby, without regard to any law, heretofore or hereafter enacted, imposing payment of all or any part thereof upon Mortgagee, except the mortgage registration tax to be paid upon the recording of this mortgage. In event of enactment of any law imposing payment of all or any portion of any such taxes upon Mortgagee, or the rendering by any court of competent jurisdiction of a decision that the undertaking by Mortgagor, as herein provided, to pay such tax or taxes is legally inoperative, then unless Mortgagor nevertheless pays such taxes, all sums hereby secured, without any deduction, shall at the option of Mortgagee become immediately due and payable, notwithstanding anything contained herein or any law heretofore or hereafter enacted.

5. To keep the premises insured against loss or damage by fire, lightning, windstorm and such other hazards as may be required by Mortgagee, in form and amount satisfactory to, and in insurance companies approved by Mortgagee. To comply with this provision Mortgagor must deliver the policy or true copy of the policy to Mortgagee to be held without liability. Upon foreclosure of this mortgage or other acquisition of the premises or any part thereto by Mortgagee, said policy shall become the absolute property of Mortgagee. In the event of failure of Mortgagor to insure the premises as herein provided or in the event of the failure of the Mortgagor to deliver the policy of insurance or true copy thereof to the Mortgagee, the Mortgagee shall insure the premises in companies of its choosing and the premium expense incurred by the Mortgagee shall be paid by the Mortgagor.

6. That Mortgagor (i) will not remove or demolish nor alter the design or structural character of any building now or hereafter erected upon the premises unless Mortgagee shall first consent thereto

in writing; (ii) will maintain the premises in good condition and repair; (iii) will not commit or suffer waste thereof; (iv) will not cut or remove nor suffer the cutting or removal of any trees or timber on the premises (except for domestic purposes) without Mortgagee's written consent; (v) will comply with all laws, ordinances, regulations, covenants, conditions and restrictions affecting the premises, and will not suffer or permit any violation thereof.

7. If Mortgagor fails to pay any claim, lien or encumbrance which is prior to this mortgage, or when due, any tax or assessment or insurance premium, or to keep the premises in repair, or shall commit or permit waste, or if there be commenced any action or proceeding affecting the premises or the title thereto, then Mortgagee, at its option, may pay said claim, lien, encumbrance, tax assessment or premium with right of subrogation thereunder, may make such repairs and take such steps as it deems advisable to prevent or cure such waste, and may appear in any such action or proceeding and retain counsel therein, and take such action therein as Mortgagee deems advisable, and for any of said purposes Mortgagee may advance such sums of money as it deems necessary, but no payment by the Mortgagee of any such monies shall be deemed a waiver of the Mortgagee's right to declare the principal sum due hereunder by reason of the default or violation of Mortgagor in any of his covenants hereunder. Mortgagee shall be the sole judge of the legality, validity and priority of any such claim, lien, encumbrance, tax assessment and premium, and of the amount necessary to be paid in satisfaction thereof. Mortgagor will pay to Mortgagee, immediately and without demand, all sums of money advanced by mortgagee pursuant to this mortgage, together with interest on each such advancement at the rate of ten per cent (10%) per annum, and all such sums and interest thereon shall be secured hereby.

8. If default for thirty (30) days be made in payment of any installment of principal or interest of said note or any part thereof, or

if default be made in performance of any of Mortgagor's obligations, covenants or agreement hereunder

(a) All of the indebtedness secured hereby shall become and be immediately due and payable at the option of Mortgagee, without notice or demand which are hereby expressly waived, and this mortgage may thereupon be foreclosed for the entire indebtedness, interest and costs, together with the statutory damages in case of protest. In the event of a foreclosure, the court shall direct a sale of the premises, to be with or without appraisement as Mortgagee may elect.

(b) Mortgagee shall, upon the filing of a petition for the foreclosure of this mortgage, be forthwith entitled to and may at once take the immediate possession of said premises and collect the rents, issues and profits thereof, being liable to account only for those actually received by Mortgagee, or Mortgagee at its option may have a receiver appointed by the court to take possession and control of the premises, and to collect the rents and profits thereof, under the directions of the court, without the proof required by statute, the amount so collected by such receiver shall be applied, under the direction of the court, to the payment of any judgment rendered or amount found due upon the foreclosure of this mortgage.

9. In case the indebtedness secured hereby or any part thereof for collection by suit or action on this mortgage is foreclosed or brought into the hands of an attorney for collection, suit, action for foreclosure, Mortgagor shall be chargeable with all costs and expenses including a reasonable attorney fee not to exceed 15 per cent of the unpaid debt, which shall be immediately due and payable and added to the mortgage indebtedness secured hereby.

10. No delay by Mortgagee in exercising any right or remedy hereunder, or otherwise afforded by law, shall operate as a waiver

thereto or preclude the exercise thereof during the continuance of any default hereunder.

11. Any agreement hereafter made by Mortgagor and Mortgagee pursuant to this mortgage shall be superior to the rights of the holder of any intervening lien or encumbrance.

12. For value received, the Mortgagor hereby expressly waives all right of homestead, exemption and stay laws granted by the Constitution and laws of the State of Oklahoma.

13. When all indebtedness secured hereby has been paid, this mortgage and all assignments herein contained shall be void and this mortgage shall be released by Mortgagee at the cost and expense of Mortgagor; otherwise to remain in full force and effect.

14. This mortgage shall inure to and bind the heirs, legatees, devisees, administrators, executors, trustees, successors and assigns of the parties hereto. Whenever used herein, the singular number shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders.

IN WITNESS WHEREOF, Mortgagor has hereunto set his hand and seal the day and year first above written.

/S/ Ernest W. Yell (seal)

/S/ Mary K. Yell (seal)

_____(seal)

_____(seal)

STATE OF OKLAHOMA}
} ss
COUNTY OF TULSA }

Before me, the undersigned, a Notary Public, in and for said County and State, on this 29th day of July, 1983, personally appeared Ernest Yell and Mary Yell to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year last above written.

/s/ Walter Gliedt
Notary Public

My commission expires:
3-15-87

Walter Gleidt

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

YELL, ERNEST W.	)	NO. 91-01685-W
YELL, MARY K.	)	CHAPTER 13
Debtor(s)	)	

OBJECTION TO CHAPTER 13 PLAN

COMES William J. Wade, Trustee, holder of the first mortgage upon the principal residence of the Debtor, and objects to the Plan herein for the following reasons:

* The claim of this Creditor is one termed over-secured;

* The Plan does not provide for payment of the true arrearages with interest over the life of the plan;

* The Plan does not provide for attorney fees.

A brief in support of the objection to the Plan is submitted herewith. The Claim filed by this Creditor is referred to herein by reference.

JOHNSON & SWENSON
BY: /s/ Lawrence A. G. Johnson
Lawrence A. G. Johnson
Attorney At Law, #4705
2535 E. 21st. Street
Tulsa, OK 74114
(918) 743-0459
Attorney for William J. Wade, Trustee

(Certificate of Service omitted in printing)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
ERNEST WILLIAM YELL and	)	Case No. 91-01685-W
MARY KATHRYN YELL,	)	Chapter 13
	)	
Debtors.	)	

MEMORANDUM DECISION

THE ORDER OF HON. MICKEY D. WILSON, UNITED STATES BANKRUPTCY JUDGE, HAS PREVIOUSLY BEEN PRINTED IN THE PETITION FOR WRIT OF CERTIORARI, AND MAY BE FOUND AT PAGE A - 16 THEREOF.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM J. WADE, TRUSTEE,	)	
	)	
APPELLANT,	)	
	)	
VS.	)	
	)	
RONNIE HANNON AND	)	
ROSETTA HANNON,	)	
	)	
APPELLEES,	)	
	)	
VS.	)	
	)	
DONALD NEAL RAKE AND	)	Case No. 91-C-477-E,
JEAN RAKE,	)	(Consolidated)
	)	91-C-572-E, and
APPELLEES,	)	91-C-632-E
	)	
	)	
WILLIAM J. WADE, TRUSTEE,	)	
	)	
APPELLANT,	)	
	)	
VS.	)	
	)	
EARNEST WILLIAM YELL AND	)	
MARY KATHRYN YELL,	)	
	)	
APPELLEES.	)	

ORDER

THE ORDER OF HON. JAMES O. ELLISON, UNITED STATES DISTRICT JUDGE, HAS PREVIOUSLY BEEN PRINTED IN THE PETITION FOR WRIT OF CERTIORARI, AND MAY BE FOUND AT PAGE A - 18 THEREOF.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WILLIAM J. WADE, TRUSTEE,	)	
	)	
Appellant,	)	
	)	
v.	)	**No. 92-5005**
	)	
RONNIE HANNON, ROSETTA HANNON,	)	
DONALD NEAL RAKE, LINDA JEAN RAKE,	)	
EARNEST WILLIAM YELL,	)	
MARY KATHRYN YELL,	)	
	)	
Appellees.	)	

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. Nos. 91-C-477-E, 91-C-572-E,
and 91-C-632-E (Consolidated))

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS PREVIOUSLY BEEN PRINTED IN THE PETITION FOR WRIT OF CERTIORARI, AND MAY BE FOUND AT PAGE A - 26 THEREOF.

Supreme Court, U.S.
FILED
DEC 23 1992

No. 92 - 621

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DONALD NEAL RAKE, ET AL.,

Petitioners,

v.

WILLIAM J. WADE, TRUSTEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONERS

DAVID A. CARPENTER*
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QUESTIONS PRESENTED

I. Did the Tenth Circuit Court of Appeals erroneously interpret this Court's opinion in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), so as to require debtors under Chapter 13 of the United States Bankruptcy Code (title 11, United States Code) to pay interest on arrearages and other charges incident to curing a default with respect to an over-secured claim secured solely by a mortgage on real property which constitutes the principal residence of such debtors?

II. Did the Tenth Circuit Court of Appeals create or contribute to an inter-circuit conflict by (mis)reading this Court's decision in *United States v. Ron Pair Enterprises, Inc., supra*, as requiring a debtor under Chapter 13 to pay interest on both pre-petition arrearages **and other charges** in order to effect a cure of default as allowed by 11 U.S.C. § 1322(b)(5), where the claim in default is both over-secured and secured only by real property constituting the principal residence of the debtor, while other circuits have correctly held that such payments are not required, and in fact would violate the provisions of 11 U.S.C. § 1322(b)(2) which prohibits a chapter 13 plan from modifying the rights of holders of claims secured solely by security interests in real property which constitutes the principal residence of the debtor?

LIST OF PARTIES

In addition to the names of the parties to the proceeding appearing in the caption of the case, Ronnie Hannon and Rosetta Hannon were debtors before the United States Bankruptcy Court for the Northern District of Oklahoma and were parties to the consolidated appeals before the United States District Court for the Northern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit.

RULE 29.1 STATEMENT

As required by Rule 29.1 of this Court, Petitioners aver that there are no parent or subsidiary companies to be listed herein.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
RULE 29.1 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	6
ARGUMENT:	
I. THE PLAIN MEANING OF THE CURE PROVISIONS IN CHAPTER 13, BANKRUPTCY CODE § 1322(b)(5), OPERATE TO THE EXCLUSION OF THE PROVISIONS OF § 506(b)	9
II. THIS COURT'S DECISION IN *RON PAIR* IS INAPPLICABLE TO A CODE § 1322(b)(5) REINSTATEMENT	12

TABLE OF CONTENTS - Continued

Page

III. THE CHAPTER 13 "CRAM DOWN" PROVISIONS ARE INAPPLICABLE TO A HOME MORTGAGE REINSTATEMENT UNDERTAKEN PURSUANT TO CODE § 1322 (b)(5) 14

IV. ELEMENTS OF A "CURE" OF THE DEFAULT IN A HOME MORTGAGE, IN A CHAPTER 13 CONTEXT, ARE DETERMINED BY RESORTING TO APPLICABLE NON-BANKRUPTCY LAW 17

V. ALTHOUGH *RON PAIR* IS INAPPLICABLE, THE COURT OF APPEALS MISREAD THAT CASE AS AUTHORITY FOR REQUIRING INTEREST ON FEES, COSTS AND OTHER CHARGES 21

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES:

Appeal of Capps, 836 F.2d 773 (3rd Cir. 1987) 10, 14

Cardinal Federal Savings & Loan Association v. Colegrove, 771 F.2d 119 (6th Cir. 1985) 6-8, 18

Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 445, 107 S.Ct. 2494, 2499, 96 L.Ed.2d 385 (1987) 10

Foster Mortgage Corporation v. Terry, 780 F.2d 894 (11th Cir. 1985) 10, 15

Hellon & Associates, Inc., v. Phoenix Resort Corp., 958 F.2d 295 (9th Cir. 1992) 11

In Re Clark, 738 F.2d 869 (7th Cir. 1984) 14

In re Garrett, 203 F. Supp. 459 (N.D. Ala. 1962) 11

In re Laguna, 944 F.2d 542 (9th Cir. 1990) 13, 18

In re Pennick, 108 B.R. 776 (Bankr.W.D.Okl. 1989) . . . 19

In Re Simpkins, 16 B.R. 1956, 1965 (Bankr. E.D. Tenn. 1982) 15

In Re Stamper, 84 B.R. 519 (Bankr. N.D.Ill. 1988) . . 14, 15

Landmark Financial Services v. Hall, 918 F.2d 1150 (4th Cir. 1990) 10, 13, 16, 18

TABLE OF AUTHORITIES - Continued

Page

Memphis Bank & Trust Co. v. Whitman,
692 F.2d 427 (6th Cir. 1982) 14

Morton v. Mancari, 417 U.S. 535, 550-551,
94 S.Ct. 2474, 2482-2483, 41 L.Ed.2d 290 (1974) 10

Radzanower v. Touche Ross & Co., 426 U.S. 148, 153,
96 S.Ct. 1989, 1992, 48 L.Ed.2d 540 (1976) 10

United States v. Ron Pair Enterprises, Inc.,
489 U.S. 235 (1989) . . . . . i, 6-8, 12, 13, 20, 21

Wilson v. Commonwealth Corp., 895 F.2d 123
(3rd Cir. 1990) 11

STATUTES:

11 U.S.C. § 506 . . . . . iii, 1, 7-10, 13, 20, 21

11 U.S.C. § 1322 . . . . . i, iii, iv, 1, 6-9, 11-18, 21

11 U.S.C. § 1325 . . . . . 1, 7, 12-17

14A *Okla. Stat.* § 2-203 . . . . . 2, 19

14A *Okla. Stat.* § 3-107 . . . . . 2, 3, 19

TABLE OF AUTHORITIES - Continued

Page

TREATISES:

5 *Collier on Bankruptcy* ¶ 1322.09[2]
(15th ed. 1992) 11, 12

5 *Collier on Bankruptcy* ¶ 1322.09[4]
(15th ed. 1992) 15, 16, 18

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, entered July 1, 1992, is reported at 968 F.2d 1036, and is reprinted in the Petition for Writ of Certiorari, Appendix page A-26. The unreported order of the United States District Court for the Northern District of Oklahoma, exercising its appellate jurisdiction over decisions of the Bankruptcy Court, is reprinted in the Petition for Writ of Certiorari, Appendix page A-18. The unreported trial court opinion of the United State Bankruptcy Court for the Northern District of Oklahoma, Honorable Stephen J. Covey and Honorable Mickey D. Wilson, are reprinted in the Petition for Writ of Certiorari, Appendix pages A-13 and A-16.

JURISDICTION

The opinion sought to be reviewed was entered by the United States Court of Appeals for the Tenth Circuit on July 1, 1992. The statutory provision conferring jurisdiction on this Court to review the opinions of the United States Court of Appeals for the Tenth Circuit by Writ of Certiorari is 28 U.S.C. § 1254(1). The Petition for Certiorari was docketed on September 28, 1992, and the Court granted the Petition on November 9, 1992.

STATUTES INVOLVED

This case involves the following federal statutes (which are fully reprinted in the Appendix to the Petition for Certiorari at pages A-1, A-2 and A-4): 11 U.S.C. §§ 506, 1322 and 1325. Pursuant to the provisions of the Supreme Court Rule 24.1(f), and due to the length of such sections, they are not set forth verbatim herein, having been previously set forth in the Petition for Writ of Certiorari.

The following Oklahoma state statutes, which are reprinted hereafter, are also involved herein: 14A *Okla. Stat.* §§ 2-203 and 3-107 (provisions of the Uniform Consumer Credit Code).

14A OKLA. STAT. § 2-203. DELINQUENCY CHARGES

(1) With respect to a precomputed consumer credit sale, refinancing, or consolidation, the parties may contract for a delinquency charge on any installment not paid in full within ten (10) days after its scheduled due date in an amount not exceeding the greater of:

(a) an amount, not exceeding Five Dollars ($5.00), which is five percent (5%) of the unpaid amount of the installment; or

(b) the deferral charge (subsection (1) of Section 2-204) that would be permitted to defer the unpaid amount of the installment for the period that it is delinquent.

(2) A delinquency charge under paragraph (a) of subsection (1) may be collected only once on an installment however long it remains in default. No delinquency charge may be collected if the installment has been deferred and a deferral charge (Section 2-204) has been paid or incurred. A delinquency charge may be collected at the time it accrues or at any time thereafter.

(3) No delinquency charge may be collected on an installment which is paid in full within ten (10) days after its scheduled installment due date even though an earlier maturing installment or a delinquency charge on an earlier installment may not have been paid in full. For purposes of this subsection payments are applied first to current installments and then to delinquent installments.

(4) The parties to a revolving charge account accessed by a seller credit card or similar arrangement may contract for a delinquency charge with respect to a payment due in connection with a billing cycle, to be payable if the payment is not made in full within ten (10) days after its due date. The delinquency charge may not exceed the greater of five percent (5%) of the unpaid amount of the payment or the dollar amount provided by the rule of the Administrator in effect for this section pursuant to Section 1-106 of this title. No more than one delinquency charge may be imposed in each billing cycle and it may be collected at any time after it accrues either independently of any payment made on the account or from a payment made if the seller discloses delinquency charges to the buyer as they are imposed and informs the buyer of the full amount that the buyer must pay for the applicable period in order to remain current on the account.

14A OKLA. STAT. § 3-107. DEFINITIONS: "LENDER"; "PRECOMPUTED";"PRINCIPAL"

(1) Except as otherwise provided, "lender" includes an assignee of the lender's right to payment but use of the term does not in itself impose on an assignee any obligation of the lender with respect to events occurring before the assignment.

(2) A loan, refinancing, or consolidation is "precomputed" if the debt is expressed as a sum comprising the principal and the amount of the loan finance charge computed in advance.

(3) "Principal" of a loan means the total of

(a) the net amount paid to, receivable by, or paid or payable for the account of the debtor;

(b) the amount of any discount excluded from the loan finance charge (subsection (2) of Section 3-109); and

(c) to the extent that payment is deferred

(i) amounts actually paid or to be paid by the lender for registration, certificate of title, or license fees if not included in (a); and

(ii) additional charges permitted by this article (Section 3-202).

STATEMENT OF THE CASE

The relevant facts in each of the underlying Chapter 13 Bankruptcy proceedings, consolidated for appellate purposes, are virtually identical, as follows:

Petitioners in this consolidated review are mortgagors of various real estate mortgages which secure the Respondent as to repayment of the Petitioners' respective promissory notes, and which were made payable to Respondent's assignor, Jim Walter Homes, Inc. Each promissory note constitutes a precomputed consumer loan under the Uniform Consumer Credit Code as adopted in the State of Oklahoma. Each of the debts to Respondent is secured only by a security interest in the particular real property which constitutes each of the Petitioners' principal residence. Each debt to Respondent constitutes a claim, pursuant to the provisions of the United States Bankruptcy Code.[1]

[1] Title 11, United States Code.

As to each claim, the Respondent is considered to be "over-secured", as the value of the particular collateral securing each claim of Respondent exceeds the amount of each such claim.

Each petitioner was in default of the terms of his or her promissory note to Respondent as of the date of commencement of each respective Chapter 13 bankruptcy proceeding. Each Chapter 13 plan proposed to repay the amount of the then existing arrearage to the Respondent over the life of each such Chapter 13 plan, without payment of interest, but including the contractually bargained for late payment penalties. None of the security interests or promissory notes herein concerned provided for any separate charge for interest on late payments of any regular installment due, each such note providing for a maximum late payment penalty of Five Dollars ($5.00) per late payment - without regard to when such default was to be cured.

Respondent timely objected to treatment afforded his various arrearage claims in the underlying bankruptcy proceedings, and the bankruptcy court denied each of these objections. (Appendix to Petition for Writ of Certiorari, pages A - 7, A - 13, and A - 16)

The United States District Court for the Northern District of Oklahoma, sitting in its appellate capacity, affirmed the decisions of the bankruptcy court. (Appendix to Petition for Writ of Certiorari, page A - 19)

The United States Court of Appeals for the Tenth Circuit reversed and remanded, holding that "in Chapter 13 plans an over-secured mortgagee of the debtor's personal residence is entitled to post-petition interest on arrearages and other charges even if the mortgage instruments are silent on the subject and state law would not require interest to be paid." (Appendix to Petition for Writ of Certiorari, page A - 41)

The Tenth Circuit has misinterpreted this Court's holding in *United States v. Ron Pair Enterprises, Inc., supra*, both in requiring interest to be paid on arrearages being cured under a Chapter 13 plan, as well as requiring interest to be paid on other charges incident to curing under 11 U.S.C. § 1322(b)(5), such as attorney's fees, late payment penalties and, in an appropriate case, costs of foreclosure.

Petitioners request this Court to reverse the Tenth Circuit Opinion and resolve the inter-circuit conflict by clarifying the correct rule, that interest may not be required to be paid, as an incident of cure under 11 U.S.C. § 1322(b)(5), in those instances in which the documents underlying the secured claim do not provide for the payment of such interest.

SUMMARY OF ARGUMENT

The opinion of the court of appeals in this case holds that in order to cure a default of a "home mortgage"[2] and maintain regular payments under Chapter 13 of the Bankruptcy Code, debtors must pay interest on all arrearages, and other charges (such as advanced insurance, attorney fees and foreclosure expenses), even if the mortgage instruments are silent on the subject and state law would not require such interest to be paid.

The court of appeals opinion relied upon this Court's holding in *Ron Pair, supra*, as well as *Cardinal Federal Savings & Loan Association v. Colegrove*, 771 F.2d 119 (6th Cir. 1985).

---

[2] For the purposes of brevity, Petitioners' brief will use the term "home mortgage" to refer to a claim secured only by a security interest in real property which constitutes the debtors' principal residence, as indicated in 11 U.S.C. § 1322(b)(2).

Interest is not required to be paid to a home mortgagee in order to cure a defaulted home mortgage under Chapter 13, however. The plain meaning of Bankruptcy Code § 1322(b)(2) prohibits the result reached in the opinion of the court of appeals.

In *Ron Pair, supra*, this Court was not called upon to interpret the interplay of the general statute, Bankruptcy Code § 506(b), with the more specific provisions of Section 1322(b)(2). The *Ron Pair* decision involved an involuntary tax lien on property of a Chapter 11 debtor. In a Chapter 11 proceeding under the Bankruptcy Code, all secured claimants which are impaired must either consent to treatment proposed in a plan of reorganization, or must be paid the present value of their allowed secured claims pursuant to Bankruptcy Code § 1129(a)(7). *Ron Pair, supra*, did not involve an interpretation of the specific provisions of Chapter 13 of the Bankruptcy Code as they relate to the general sections found in Chapter 5 of the Code. For this reason *Ron Pair, supra*, is inapplicable to the facts presented herein.

To require that interest be paid in order to cure a defaulted, oversecured home mortgage, where such interest is not included within the contract documents, violates the provisions of Bankruptcy Code § 1322(b)(2), prohibiting plan modification of the terms of a home mortgage.

The opinion of the court of appeals, to the extent that it relies upon *Colegrove, supra*, is also in error. The opinion in *Colegrove* erroneously assumed that § 1325(a)(5)(B)(ii) was applicable to a home mortgage cure situation in Chapter 13. This is not so. This particular paragraph of Section 1325, in certain circumstances, requires the present value of an allowed secured claim be paid in order to present a confirmable plan to the bankruptcy court. The error of the court of appeals in *Colegrove, supra*, was in not recognizing that Code § 1325(a)(5)(B)(ii) is the Chapter 13 "cram down" provision. "Cram down", as used in the bankruptcy context, necessarily implies a

modification of the claim of the secured claimant. Such modification could be in terms of the allowed secured claim amount, the interest rate proposed to be paid, or the term in which such repayment would be effected. The terms of a home mortgage, however, may not be modified in a Chapter 13 plan pursuant to the provisions of Bankruptcy Code § 1322(b)(2). Therefore, *Colegrove, supra*, is in error by presupposing the applicability of the Chapter 13 "cram down" provisions to a home mortgage claim.

More fundamentally, the curing of a home mortgage arrearage in a Chapter 13 context is determined by applicable non-bankruptcy law and not by Section 506(b) of the Code. Respondent's claims in the matters presented to the bankruptcy court were not created by the Bankruptcy Code, but were created in accordance with the contract between the parties and applicable non-bankruptcy law, here state law. Additionally, the defaults by the Petitioners are not determined by the Bankruptcy Code, but rather are conditions brought about by the non-payment of installments when due. The legal consequence of a default by reason of non-payment of a home mortgage is determined, not by a reference to the Bankruptcy Code, but through the applicable state law of contracts. Cure of the default, then, is not a function of the Bankruptcy Code, or bankruptcy law, but is performed in accordance with the terms of the contract between the parties, as regulated by state law. Therefore, although a cure of a default in a home mortgage may be paid through a Chapter 13 plan, the cure is made by reason of and is governed by applicable non-bankruptcy law.

The opinion of the court of appeals below further compounds its error by requiring interest be paid, not only on the arrearage, but also on all other charges, including advanced insurance, attorney fees, costs of foreclosure, and any other recoverable expenses incurred by the claimant. This Court, in *Ron Pair, supra*, specifically dealt with the issue of what constituent items must be paid with interest in instances in which Bankruptcy Code § 506(b) does control. The only element which Code § 506(b) requires to be paid with interest is the

actual arrearage, and thus the court of appeals has misinterpreted the opinion of this Court in *Ron Pair, supra*, and should be reversed for that reason.

ARGUMENT

I. THE PLAIN MEANING OF THE CURE PROVISIONS IN CHAPTER 13, BANKRUPTCY CODE § 1322(b)(5), OPERATE TO THE EXCLUSION OF THE PROVISIONS OF § 506(b)

Where a Chapter 13 debtor wishes to reinstate a home mortgage (or indeed any defaulted, secured or unsecured claim on which the last payment is due after the final plan payment), Code § 1322(b)(5) permits the debtor to reinstate such long term debt by maintaining payments during the pendency of the Chapter 13 proceeding, and effecting a cure within a reasonable time. Because Code § 1322(b)(5) specifically controls notwithstanding the provisions of Code § 1322(b)(2), defaults in payments on home mortgages are permitted to be cured in a Chapter 13 context. Thus, the Bankruptcy Code itself has the effect of modifying the provisions of a home mortgage by prohibiting foreclosure and permitting "deacceleration" of the home mortgage. Although Code §1322(b)(2) otherwise prohibits the modification of a home mortgage in a plan, the Code itself supplies a modification function independently of the plan, authorizing a plan to provide for cure and reinstatement without modifying the terms of the home mortgage.

The reinstatement provisions of Code §1322(b)(5) are very narrow in application. They apply only to claims whose maturity dates extend past the end of the Chapter 13 plan, require maintenance of regular payments during the course of the Chapter 13 plan, and must provide for cure of the default within a reasonable time. This is clearly a special statute and must control over the general interest requirements of Code § 506(b). This Court, on numerous occasions,

has held that where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of priority of enactment. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445, 107 S.Ct. 2494, 2499, 96 L.Ed.2d 385 (1987); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S.Ct. 1989, 1992, 48 L.Ed.2d 540 (1976); and *Morton v. Mancari*, 417 U.S. 535, 550-551, 94 S.Ct. 2474, 2482-2483, 41 L.Ed.2d 290 (1974).

This issue has been fully explored by the United States Court of Appeals for the Fourth Circuit, in the case of *Landmark Financial Services v. Hall*, 918 F.2d 1150 (4th Cir. 1990). In *Landmark*, the court of appeals, at 1154, stated:

> Section 506(b) provides the means by which the extent of a creditor's secured claim is established. ... By accretion, the value of the secured claim grows by the agreed charges and by interest from the date of filing through the confirmation date. A mortgage cure, in a sense, occurs outside the ambit of the [Bankruptcy] Code. Any charges such as late fees may indeed be payable by the mortgagor who elects to cure, but such charges would be mandated not by § 506(b) but, rather, because they are integral elements of the cure.

This position has also found support in the Third and Eleventh Circuits, in the cases of *Appeal of Capps*, 836 F.2d 773, 776 (3rd Cir. 1987) and *Foster Mortgage Corporation v. Terry*, 780 F.2d 894, 897 (11th Cir. 1985).

Bankruptcy Code § 1322 has been held by one circuit to be a specific statute which controls over the general applicability of Code § 506. *Wilson v. Commonwealth Corp.*, 895 F.2d 123 (3rd Cir. 1990). Additionally, where the statutory language employed by

Congress is clear, there is no need to look further than the language of the statute itself in determining its meaning. *Hellon & Associates, Inc., v. Phoenix Resort Corp.*, 958 F.2d 295 (9th Cir. 1992).

The plain meaning of Code § 1322(b)(5), therefore, marks the limits of what is required to reinstate a defaulted home mortgage in a Chapter 13 context.

The concept of curing a defaulted long term debt in Chapter 13 has its genesis in case law interpreting Chapter XIII of the former Bankruptcy Act, whereby bankruptcy courts would grant injunctions prohibiting foreclosure on mortgages during the pendency of the Chapter XIII case. See *In re Garrett*, 203 F. Supp. 459 (N.D. Ala. 1962). With the promulgation of the Bankruptcy Rules in 1973, the injunction became automatic upon the filing of the bankruptcy petition.

As the editor of *Collier on Bankruptcy* states:

> The Commission on the Bankruptcy Laws of the United States, in its Report to the Congress, recognized the difficulties in dealing with mortgages and other secured claims under the Act. Its proposed statute, the forerunner of the Code finally enacted, essentially codified the cases permitting injunctions against foreclosure and allowing a reasonable time to cure defaults. Moreover, since debts secured by real property were no longer excluded from treatment in the Commission's equivalent of Chapter XIII, the Commission's bill permitted inclusion of provisions to cure defaults on mortgages as part of the debtor's plan.
>
> The Commission's proposals were modified slightly during the legislative process thereafter, but

> the concept of allowing debtors to cure mortgage defaults survived intact. (footnotes omitted)

5 *Collier on Bankruptcy* ¶ 1322.09[2] (15th ed. 1992).

Code § 1325(a)(5)(B)(ii), the Chapter 13 "cram down" section, requires holders of modified secured claims be paid the present value of such allowed secured claims as a precondition to plan confirmation. Its inclusion in Chapter 13 is entirely independent of the cure provisions of Section 1322(b)(5). It is clear, therefore, that the enactment of Code § 1322(b)(5) was an outgrowth of pre-Code practice, and no Congressional intent to require interest payments as an incident to curing defaults is to be found in either Code § 1322(b)(2) or § 1325(a)(5)(B)(ii). This lends even more credence to the proposition that Code § 1322(b)(5) operates independently of the present value provisions of section 1325.

II. THIS COURT'S DECISION IN *RON PAIR* IS INAPPLICABLE TO A CODE § 1322(b)(5) REINSTATEMENT

The opinion of the court of appeals below rested heavily upon the rationale of this Court in *Ron Pair, supra*. That decision, however, involved a proceeding under Chapter 11 of the Bankruptcy Code. In fact, Chapter 13 would not have been available to the debtor in *Ron Pair, supra*, for the reason that Ron Pair Enterprises, Inc. is not a natural person, and therefore, under Code § 109(e) would be ineligible.

There are no correlative sections in Chapter 11 to Code § 1322(b)(5). Indeed, with respect to non-consenting secured but impaired classes, all must receive the present value of their secured claims pursuant to Code § 1129(a)(7).

Also, in *Ron Pair* the debtor was not attempting to cure a default and reinstate a long term debt, but was instead contesting the necessity of paying interest on an involuntary tax lien placed upon property of the estate by the Internal Revenue Service. The holding in *Ron Pair, supra*, is not applicable to the present proceeding for the reason that its facts are substantially different, involving entirely separate chapters of the Bankruptcy Code, and did not involve a specific statute (Code § 1322) which controlled over the more general one, Code § 506. Further, the holding in *Ron Pair, supra*, is limited to the issue of whether interest must be paid on voluntary versus involuntary secured claims in a Chapter 11 context.

In *Landmark, supra*, the court stated at 1154:

> [The mortgagee] also points to § 506(b) and a recent decision, *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989), as authority for the proposition that the bank, as an oversecured creditor, is entitled to postpetition interest on its arrearage claim during the pendency of the case, i.e., after filing but prior to confirmation. Ron Pair erased the consensual/nonconsensual distinction which some courts had used to deny § 506(b) interest on claims based on nonconsensual liens such as tax liens. Despite some broad language in Ron Pair, however, we think § 506(b) is inapplicable in the context of [Chapter 13] mortgage cures.

This view has also found support in the Ninth Circuit, in the case of *In re Laguna*, 944 F.2d 542 (9th Cir. 1990), wherein the court of appeals held *Ron Pair* inapplicable to a Chapter 13 home mortgage cure, for the reason that the mortgagee's right to postpetition interest was qualified by the interplay existing between Code §§ 1322(b) and 1325(a) with respect to modification and cure.

III. THE CHAPTER 13 "CRAM DOWN" PROVISIONS ARE INAPPLICABLE TO A HOME MORTGAGE REINSTATEMENT UNDERTAKEN PURSUANT TO CODE § 1322 (b)(5)

In all of Chapter 13 of the Bankruptcy Code, there is only one section involving the time value of money, and that is customarily referred to as the "cram down" provision of Chapter 13, Code § 1325(a)(5)(B)(ii). Judge Ginsberg, in *In Re Stamper*, 84 B.R. 519 (Bankr.N.D.Ill. 1988) extensively explored application of the Chapter 13 "cram down" section to residential mortgages. Judge Ginsberg, at 522, points out that Code § 1325(a)(5)(B)(ii) is clearly intended for the benefit of secured creditors whose rights **have been modified** by a Chapter 13 plan. Where the rights of a secured creditor have been modified in a Chapter 13 plan, the creditor is entitled to receive an additional amount for the time value of money. *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427 (6th Cir. 1982).

There can be no application of Code § 1325(a)(5)(B)(ii) where a creditor's only security consists of the debtor's home, because Code § 1322(b)(2) prohibits plan modification of the contractual rights of the holder of a principal residence mortgage, absent the mortgagee's consent. As Judge Ginsberg, in *In Re Stamper, supra*, so cogently observes at 522:

> Because the Bankruptcy Code permits an involuntary deacceleration and cure, the mortgagee's rights are not modified by such [Chapter 13 plan]. *In Re Capps*, 836 F.2d 773 (3rd Cir. 1987); *In Re Clark*, 738 F.2d 869 (7th Cir. 1984). Instead, the effect of the "cure" is to place the parties in their respective positions prior to the default. The other contract terms remain in force other than for the right to accelerated payments, and the mortgagee will receive all of the interest, charges, and costs to which it is entitled under the

> contract. 5 *Collier on Bankruptcy* ¶ 1322.09[4] (15th ed. 1988). Because the cure does not work a modification of the mortgagee's rights, "[t]he time value of money is irrelevant", *In Re Simpkins*, 16 B.R. 1956, 1965 (Bankr. E.D. Tenn. 1982), unless the contract specifically provides for interest on the arrears in the event of a cure.

Because the "cram down" provisions of Code § 1325(a)(5)(B)(ii) cannot be employed by a debtor to modify the rights of a home mortgagee, the time value of money provisions of the "cram down" section have no applicability in the home mortgage reinstatement context. As no other Chapter 13 provision provides for a present value test as a condition precedent to confirmation of a Chapter 13 plan, Code § 1325(a)(5)(B)(ii) provides no safe haven for the Respondent's position that postpetition interest must be paid.

Judge Ginsberg further observed in *In Re Stamper*, 84 B.R. at 522:

> In fact, under this analysis, to require a Chapter 13 debtor to pay interest on the arrears when the home mortgage agreement does not provide for such would be an impermissible modification of that home mortgage under 11 U.S.C. § 1322(b)(2). After all, nothing in 11 U.S.C. § 1322(b)(2) permits alterations in a home mortgage agreement which are detrimental to the debtor. All involuntary modifications are prohibited regardless of whether they would benefit the debtor or lender. If 11 U.S.C. § 1322(a)(5)(B)(ii) is read to require interest payments on arrears as a matter of law, it would conflict with 11 U.S.C. § 1322(b)(2). See *In Re Terry*, 780 F.2d 894, 896-897 (11th Cir. 1986).

Judge Ginsberg's view is supported in *Landmark, supra*, where the court observes that the "cram down" present value requirement of Code § 1325(a)(5)(B)(ii) is the means by which the Code compensates secured creditors for any modification of their rights. The court at 1154 stated:

> The present value test of § 1325 is designed to factor in the time value of the deferred payments in order to assure full satisfaction of [modified] secured claims.

The leading treatise on bankruptcy law also supports the proposition that, "cram down" being inapplicable to home mortgage cure in Chapter 13, no Bankruptcy Code - mandated interest is required to be paid on the amounts necessary to cure the default. The editors of *Collier on Bankruptcy*, at ¶ 1322.09[4] (15th ed. 1992) state:

> When a default on a mortgage or other long term debt is cured under section 1322(b)(5), the full amount of the creditor's claim is not paid during the chapter 13 cases. Rather, the debtor preserves the benefit of a longer payment schedule which extends beyond the due date of the last payment under the plan, and the creditor is protected by the exception to discharge for long term debts on which defaults are cured.
>
> Thus, the curing of defaults pursuant to section 1322(b)(5) is a right conceptually distinct from chapter 13 cramdown, which allows a debtor to modify the rights of secured creditors by reducing their payments or in other ways.
>
> ....

> However, ... neither the present value test of section 1325(a)(5) nor the best interests of creditors test of section 1324(a)(4) is applicable where a default is cured pursuant to section 1322(b)(5). The present value tests compensate creditors whose rights have been modified by reductions in payments, interest charges or the total amount due; where a default is cured, however, the creditor's rights are not modified. Since the contract terms remain in force (except for the injunction against foreclosure) the time value of money is irrelevant. The creditor receives the interest, charges and costs to which it is entitled under the contract and applicable nonbankruptcy law. (footnotes omitted)

IV. ELEMENTS OF A "CURE" OF THE DEFAULT IN A HOME MORTGAGE, IN A CHAPTER 13 CONTEXT, ARE DETERMINED BY RESORTING TO APPLICABLE NON-BANKRUPTCY LAW

Bankruptcy Code § 101(5) defines a claim as a right to receive payment or to other equitable relief. The Bankruptcy Code itself does not create the claim, but rather the claim is determined by virtue of state law giving rise to an indebtedness, in this case the obligations of the Petitioners to the Respondent which are secured by the home mortgages. Likewise, a default is not determined by resort to the Bankruptcy Code, but is a condition brought about by reason of the nonpayment of installments when due, pre-petition.

The concept of cure is not defined in Chapter 13 of the Bankruptcy Code. It is that series of events necessary to put the claimant in the position it would have enjoyed had no default occurred.

Absent the overlay of the Bankruptcy Code, in each of the home mortgages presented to this Court for consideration, Petitioners

could have paid the defaulted installments plus 5% of such installments or $5.00 per installment, whichever amount was less, as a one time penalty for late payment. That constitutes the agreement bargained for by the parties. Cure, therefore, consists of payment to the Respondent only of the delinquent installments, plus 5% or $5.00 per installment as a one time late payment penalty, as well as any other recoverable charges, such as attorney fees and costs.

The court in *Landmark, supra* at 1155, also holds that state law is the applicable nonbankruptcy law to determine any right to postpetition interest on prepetition arrearages:

> The valuation of the claim or the collateral is simply immaterial when the original agreement is reinstated and the debtor elects to make all the payments called for by the agreement. The mortgagee receives only the interest and other charges to which it is entitled under the agreement and **applicable nonbankruptcy** law. *Collier*, ¶ 1322.09[4]; *In re Laguna*, 114 B.R. 214, 216 (9th Cir. BAP 1990). (emphasis added)

As previously shown, Bankruptcy Code § 1322(b)(2) prevents a Chapter 13 plan from modifying the rights of a holder of a secured claim, which claim is secured only by real property constituting the debtors' principal residence. Since the "cram down" provisions of Chapter 13 are inapplicable to a home mortgage claim, the interest requirement as an incident to cure, which the Sixth Circuit found to exist in *Colegrove, supra*, is in irreconcilable conflict with the specific requirements with Code § 1322(b)(2).

As there is no prescribed method of cure found in Chapter 13, other than the requirement that it be performed within a reasonable time, and as the Bankruptcy Code in general does not specify the specific requirements necessary to effect a cure, it is necessary to resort to applicable non-bankruptcy law in order to determine the

specific requirements of curing a default. In the cases consolidated for review before this Court herein, the underlying contracts and the state law of Oklahoma concerning contracts is that applicable nonbankruptcy law.

Applicable state law is reprinted at the outset of this brief. The promissory notes involved herein (J.A. 8 and 24) are clearly precomputed consumer loans as set forth in 14A *Okla. Stat.* § 3-107.[3] Both notes are expressed as a sum comprising the principal and the amount of the loan finance charge, computed in advance. 14A *Okla. Stat.* § 2-203 prohibits these notes, as precomputed consumer loans, from making any charge in excess of $5.00 or five percentum of each delinquent installment, without regard to the length of the interval before payment of the delinquent installment. These provisions of Oklahoma state law have been enacted as a part of the Oklahoma adoption of the Uniform Consumer Credit Code. Respondent must have been aware of the application of this applicable state law, as its own form promissory notes (J.A. 8 and 24) provide for delinquency remedies which are exactly in conformity with the permitted late payment penalties set out in 14A *Okla. Stat.* § 2-203.

Virtually identical contract documents to those at issue herein were considered in this same context by the United States Bankruptcy Court for the Western District of Oklahoma in the case of *In re Pennick*, 108 B.R. 776 (Bankr.W.D.Okl. 1989), where the court stated at 778:

> In this court's opinion, the default provision constitutes a delinquency or late charge and nothing more. Under § 3-203(1)(a) of the Uniform Consumer Credit Code ("UCCC"), Okla. Stat. tit. 14A, § 1-101

---

[3] Title 14A of the Oklahoma Statutes constitutes the Oklahoma version of the Uniform Consumer Credit Code, which has been adopted in Colorado, Guam, Idaho, Indiana, Oklahoma, South Carolina, Utah, Wisconsin and Wyoming.

> *et seq.* (Supp.1990), a delinquency charge of not to exceed $5.00 is permitted with respect to a precomputed consumer loan (§ 3.107) such as this. In § 3-203(2), it is provided that such delinquency charge **"may be collected only once on an installment however long it remains in default."** (emphasis added)

Thus, Oklahoma law has invalidated Respondent's position that postpetition interest must be paid on the defaulted installments, as the value of the delinquency is incorporated in the $5.00 late payment charge.

As applicable Oklahoma law prohibits the payment of interest in the curing of the precomputed consumer loans at issue herein, and the contracts of the parties fail to include any requirement for paying interest as an incident to curing a default, no requirement for interest can be upheld in this Chapter 13 context. To do so would amount to granting to Respondent greater rights than those to which he would have been entitled absent the invocation of the bankruptcy court's jurisdiction. As shown in the underlying agreements (J.A. 8 and 24), the parties bargained and agreed and that if any installment was not paid within 15 days of its scheduled due date, the Petitioners would be charged $5.00 or 5% of the unpaid installment as a one time late fee, whichever amount was less.

Since as set forth above, Code § 506(b) has no applicability to a home mortgage cure scenario in Chapter 13, and as there are no remaining bankruptcy provisions which dictate the specifics of a home mortgage cure in Chapter 13, it is clear that cure is a concept determined by applicable non-bankruptcy law, which in this context consists of the agreement between the parties and state law.

V. ALTHOUGH *RON PAIR* IS INAPPLICABLE, THE COURT OF APPEALS MISREAD THAT CASE AS AUTHORITY FOR REQUIRING INTEREST ON FEES, COSTS AND OTHER CHARGES

Without conceding that there is any applicability of *Ron Pair, supra*, to the case presently before this Court, Petitioners urge that the court of appeals below misread *Ron Pair* as authority for its apparently preconceived notion that interest must be paid on fees, costs, or charges provided for under the agreement under which such claim arose, in order to effect a cure under Code § 1322(b)(5). In fact, this Court clearly stated that interest was to be paid only on the claim and that the grammatical rendition of the statute by Congress prohibited the imposition of interest on fees, costs, or charges provided under the agreement. *Ron Pair*, 489 U.S. at 241.

This very clear holding in *Ron Pair, supra*, was completely ignored by the Tenth Circuit, below, as in its concluding paragraph (see Appendix to Petition for Writ of Certiorari, page A-40) wherein the court of appeals stated:

> Thus, although we reason somewhat differently, we join the Sixth Circuit in holding that in Chapter 13 plans, an oversecured mortgagee of the debtor's personal residence is entitled to post-petition interest on arrearages **and other charges even if the mortgage instruments are silent on the subject and state law would not require interest to be paid.** (emphasis added)

It seems clear that, although paying lip service to this Court's opinion in *Ron Pair, supra*, the court of appeals below was attempting to find a rationale for justifying its preconceived notion that Chapter 13 home mortgage cures must include full interest on the time value of money for any and all appropriate charges covered in the underlying

agreements. This conclusion, however, is inapposite to the specific provisions of Code § 506(b), as interpreted by this Court in *Ron Pair, supra*.

CONCLUSION

For the above reasons, Petitioners urge this Court to reverse the United States Court of Appeals for the Tenth Circuit and reinstate the judgment of the district court in favor of Petitioners.

Respectfully submitted,

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No. 92-621

In The

Supreme Court of the United States

October Term, 1992

DONALD NEAL RAKE, *et al.*,

Petitioners,

vs.

WILLIAM J. WADE, Trustee,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT

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EDITOR'S NOTE

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RULE 21.1 STATEMENT

Willlam J. Wade is Trustee of Mid-State Trust II, a Delaware Business Trust. The beneficiary of the trust is Mid-State Homes, Inc., a Florida Corporation, which is a subsidiary of Mid-State Holdings Corporation, a Delaware Corporation, wholly owned by Walter Industries, Inc.. Walter Industries, Inc. is a Delaware Corporation and owns also all of the stock of the subsidiary companies, to wit: Best Insurors, Inc., Cardem Insurance Co., Ltd., Coast to Coast Advertising, Inc., Computer Holdings Corporation, Dixie Building Supplies, Inc., Hamer Holdings Corporation, Homes Holdings Corporation (which has as a subsidiary Jim Walter Homes, Inc.), JW Aluminum Company, Jim Walter Resources, Inc., JW Window Components, Inc., J.W.I. Holdings Corporation, Land Holdings Corporation, Railroad Holdings Corporation, Sloss Industries Corporation, Southern Precision Corporation, United Land Corporation, United States Pipe and Foundry Company, and Vestal Manufacturing Company.

TABLE OF CONTENTS

	Page
Rule 21.1 Statement	i
Table of Contents	ii
Table of Citations	ii
Statement of the Case	1
Summary of Argument	3
Argument	4
I. The intent of Congress is to provide special treatment to holders of home mortgages.	4
II. Not allowing interest upon arrearages is contrary to the express provisions of the Code.	10
III. The full amount of the home mortgage claim is the "allowed" amount for distribution under the chapter 13 plan.	16
IV. In absence of contractual provisions, Oklahoma law provides for interest.	24
Conclusion	28

TABLE OF CITATIONS

Cases Cited:

Appeal of Capps, 836 F.2d 773 (3rd Cir. 1987) 12, 13, 17

Contents

	Page
Champlin Refinery Co. v. Phillips Petroleum Co., 269 P.2d 993 (1954)	24, 25
Circle v. Jim Walter Homes, Inc., 654 F.2d 688 (10th Cir. 1981)	27
Dewsnup v. Timm, __, U.S. __, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992)	8, 14
Gozlon-Peretz v. United States, __ U.S. __, 111 S. Ct. 840 (1991)	24
Grubbs v. Houston First American Savings Association, 718 F.2d 694 (5th Cir. 1983)	15
Grubbs v. Houston First Am. Sav. Ass'n, 730 F.2d 236 (5th Cir. 1984)	15
In re Cardinale, 1992 WL 166025 (Bankr. D.R.I. 1992)	23
In re Colegrove, 771 F.2d 119 (6th Cir. 1985)	11, 12, 17
In re Hall, 117 B.R. 425 (Bankr. S.D. Ind. 1990)	18
In re Hart, 923 F.2d 1410 (10th Cir. 1991)	23, 24
In re Laguna, 944 F.2d 542 (9th Cir. 1991)	12, 13, 17
In re Sainz-Dean, 139 B.R. 739 (Bankr. D. Colo. 1992)	23
In re Terry, 780 F.2d 894 (11th Cir. 1985)	12, 17, 18, 19, 23

Page

In re Thomas, 115 B.R. 305 (Bankr. E.D. Okla. 1990) 10

Landmark Financial Services v. Hall, 918 F.2d 1150 (4th Cir. 1990) 12, 13, 17

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 55 S. Ct. 854, 79 L. Ed. 1593 (1935) 8, 9, 10

Matter of Nobleman, 968 F.2d 483 (5th Cir. 1992) 24

Patterson v. Shumate, __ U.S. __, 112 S. Ct. 2242 (1992) 14

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) 4, 5, 13, 14, 18

United States Financial Corp. v. Brantley, 6 B.R. 178 (Bankr. N.D. Fla. 1980) 15

Wade v. Hannon, 968 F.2d 1036 (10th Cir. 1992) 14, 17

Statutes Cited:

11 U.S.C. § 362 ..... 3, 10

11 U.S.C. § 506 12

11 U.S.C. § 506(a) 4, 24

11 U.S.C. § 506(b) 1, 4, 12, 13, 14, 18, 24

11 U.S.C. § 1322 ..... 5, 11

Page

11 U.S.C. § 1322(b) 5

11 U.S.C. § 1322(b)(2) 1, 3, 5, 12, 14, 17, 23, 24, 28

11 U.S.C. § 1322 (b)(5) 1, 3, 10, 12, 13, 14, 16, 17

11 U.S.C. § 1322(b)(5)(ii) 15

11 U.S.C. § 1325 ..... 12, 13

11 U.S.C. § 1325(a) 12

11 U.S.C. § 1325(a)(5) 18

11 U.S.C. § 1325(a)(5)(ii) 16, 17, 18

11 U.S.C. § 1325(a)(5)(B) 12

11 U.S.C. § 1325(a)(5)(B)(ii) 1, 4, 6

12 Okla. Stat. § 727 (1991) 25

14A Okla. Stat. § 1-203 25

14A Okla. Stat. § 2-104(2)(b) 25, 26

14A Okla. Stat. § 3-102 (1991) 26

14A Okla. Stat. § 3-105 (1991) 26

14A Okla. Stat. § 3-107 25

Contents

	Page
23 Okla. Stat. § 6 (1991)	24
United States Constitution Cited:	
Fifth Amendment	8
Rule Cited:	
Bankruptcy Rule 3001(a)	14
Other Authorities Cited:	
Okla. Const. Art. 14 § 2	24
Cong. Rec. (Sept. 28, 1978) p. H. 11107, reprinted in 1978 U.S.C.C.A.N. p. 6550	6
Cong. Rec. (October 5, 1978) p. S. 34009	7
S. 1985	7
H.R. 5321	7
H. Rep. No. 95-595, p. 429	5
Paul D. Boynton, Claims of Home Mortgage Lenders Against Chapter 13 Debtors: Should Full Payment Include Interest on Arrearages Repaid Over Time? 97 Commercial Law Journal 384 (Fall 1992)	16
The Bigelow Papers, Series II	11

STATEMENT OF THE CASE

The straight-forward facts in this case involve the statutory right of an over-secured mortgagee to recover interest upon arrearages (including past due payments, late charges, court costs, and attorney fees and contractual advancements) in a chapter 13 plan where the mortgage constitutes a first lien upon the principal residence of the Debtor. As such, this right is not dependent upon contractual provisions for interest upon defaulted arrearages but upon the clear intent of Congress and the express, unambiguous provisions of the Bankruptcy Code. Contrary to Petitioner's contention on page 4 of their brief, the promissory notes do not constitute a pre-computed consumer loan under the Uniform Consumer Credit Code. The reason for this is discussed in detail *infra*.

Examination of four Bankruptcy Code sections is mandated: §§ 506(b), 1322(b)2, 1322(b)5, and 1325(a)(5)B)(ii).

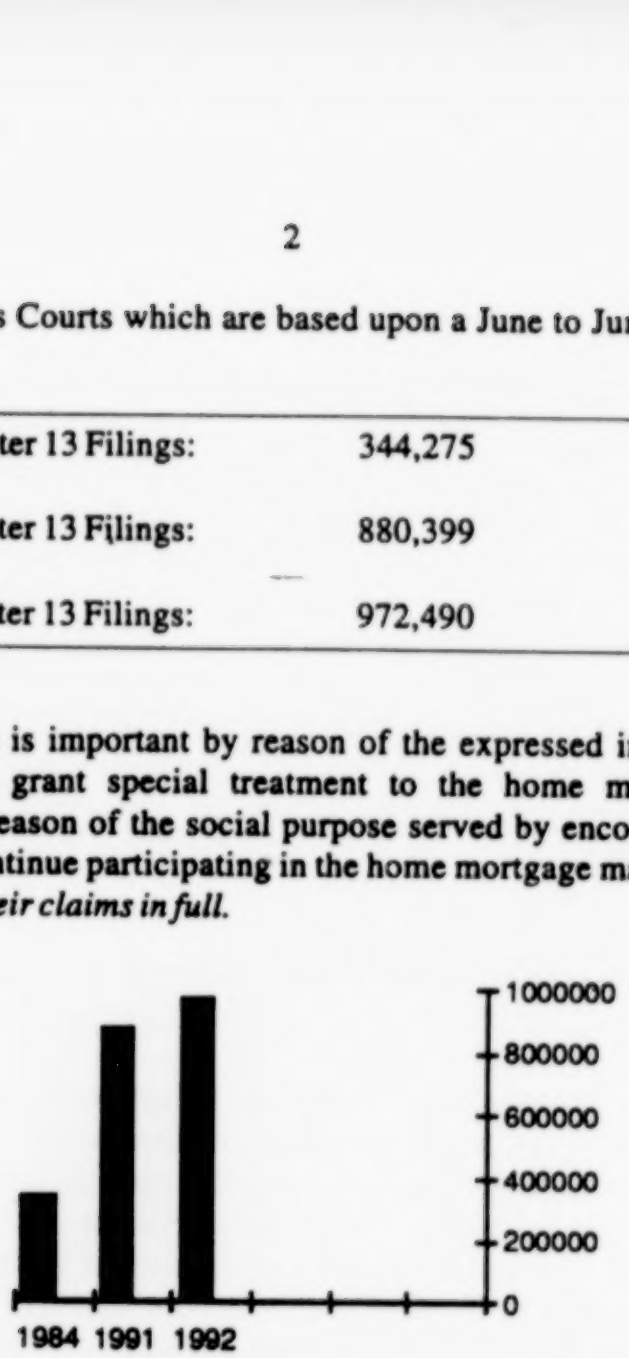
This examination is crucial to the national economy on two fronts: First, the home lending industry is on its knees as a result of many economic factors, some of which resulted from injudicious loans, over-evaluation of property values, corrupt lending practices, to name some involving the fault of the industry. Other reasons not the fault of the industry are the normal fall in real estate values, the sad times which have resulted in a large number of foreclosures, and the wild fluctuation of interest rates. Second, is the large number of chapter 13 bankruptcies that have involved the varying and inconsistent treatment of home mortgages by the courts.

The following chart and graph indicate the huge increase of chapter 13 filings since 1984, according to the statistics compiled by the Bankruptcy Division of the Administrative Office of the

United States Courts which are based upon a June to June fiscal year.

1984 Chapter 13 Filings:	344,275
1991 Chapter 13 Filings:	880,399
1992 Chapter 13 Filings:	972,490

This case is important by reason of the expressed intent of Congress to grant special treatment to the home mortgage industry by reason of the social purpose served by encouraging lenders to continue participating in the home mortgage market *by preserving their claims in full.*



By reason of the fact the Bankruptcy Code is not a model of clarity, early attacks on the rights of mortgagees resulted in a myriad of conflicting decisions by the courts, such as denying interest upon arrearages where the mortgagee is over-secured, bifurcating the allowed claim on under-secured mortgagees such that 100 per cent of the secured portion is paid under the plan, but only cents on the dollar is paid to what was denominated the unsecured claim. In other cases, interest was allowed at the

contract rate, at the market rate, at the treasury rate, or not at all.

The confusion is so profound, that at the present time in the Western District of Oklahoma one District Judge rules that bifurcation is proper in a chapter 13 context on a home mortgage where another District Judge down the hall rules that it is not proper.

Confusion is rift amongst the courts on these issues before it, and the violence to the home lending market by reason of this confusion is in direct violation of the intent of Congress and the express terms of the Code.

SUMMARY OF THE ARGUMENT

It is clear from the legislative History that through compromise between the House and Senate, while some secured claims were subject to modification, those secured claims which were first liens upon the principal residence of the Debtor were not to be modified; however, Congress did allow modification of those secured claims to the extent of the automatic stay of foreclosure under 11 U.S.C. § 362 and the modification of the right to foreclosure by deacceleration of the debt, and the forcing of the forebearance of timely payment of arrearages under 11 U.S.C. § 1322(b)(5) over a period of thirty-six or sixty months.

In lieu of being allowed the right to foreclose and to receive the accelerated amount of the defaulted debt, Congress intended that secured claims under chapter 13 be treated identically with secured claims under chapter 11. The time value of deferred payments was recognized as being equal in both chapter 13 and 11, but the courts have divided upon their interpretation of the Code.

While saying in one breath that 11 U.S.C. § 1322(b)(2) prohibits modification of home mortgages by the denial of

granting the time value of money by interest upon the unpaid arrearages, the courts find little difficulty in rationalizing that under 11 U.S.C. § 506(a) bifurcating such a claim into an secured claim and an unsecured claim is not a modification of the mortgage.

There is absolutely no justification in the holding of the Circuits to the effect that 11 U.S.C. § 1325(a)(5)(B)(ii) has no application to home mortgages.

There is nothing in the Code that provides that cure of the default is a function of state law rather than bankruptcy law. There is nothing in the Code that provides that cure in a chapter 13 context is governed by applicable non-bankruptcy law.

The Bankruptcy Code pre-empts state law with reference to the treatment of home mortgages. The claim that the Uniform Consumer Credit Code applies to the subject mortgages and promissory notes is totally without statutory or case law foundation. This Court should consider the issues in this action in conjunction with the pending matter relating to bifurcation of home mortgages for the reason the issues are inter-locked. This Court should affirm the holding of the Tenth Circuit in this case.

ARGUMENT

I.

THE INTENT OF CONGRESS IS TO PROVIDE SPECIAL TREATMENT TO HOLDERS OF HOME MORTGAGES.

Insofar as § 506(b) is concerned, need for resort to legislative intent is minimal. This Court in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S. Ct. 1026, 103 L. Ed. 2d. 290

(1989) dealt with a Chapter 11 plan involving a non-consensual lien. It was expressed that resort to legislative intent was not necessary for the reason the statute was sufficiently clear by its terms as to entitle the holder of an over-secured claim to post petition interest, "and in addition gives one having a secured claim created pursuant to an agreement the right to reasonable fees, costs, and charges provided for in that agreement. Recovery of post petition interest is *unqualified.* Recovery of fees, costs, and charges, however, is allowed only if they are reasonable and *provided for in the agreement* under which the claim arose. Therefore, in the absence of an agreement, post petition interest is the only added recovery available." 109 S. Ct. at 1030. The Court observed that whether or not Congress took notice of pre-Code practice, yet it expressed this statute with sufficent clarity that resort to legislative history and to pre-Code practice was not necessary.

Examination of legislative intent is pertinent insofar as § 1322 is concerned. When the House considered the proposed bill as reported from the Committee, § 1322(b) provided for the modification of the rights of all secured and unsecured claims. Paragraph 5 of that section provided for the curing of defaults of long-term debt on which the last scheduled payment of the debt came due after the last payment under the plan. H. Rep. No. 95-595, p. 429.

The present § 1322(b)2 represents a compromise between the House version and the Senate version. The Senate proposed the subsection read:

> (2) modify the rights of holders of secured claims (other than claims wholly secured by mortgages on real property) or holders of unsecured claims;

The final version was explained as follows:

> Section 1322(b)2 of the House amendment represents a compromise agreement between similar provisions in the House bill and Senate Amendment. Under the House amendment, the plan may modify the rights of holders of secured claims other than a claim secured by a security interest in real property that is the debtor's principal residence. It is intended that a claim secured by the debtor's principal residence may be treated with under section 1322(b)5 of the House amendment.

See Cong. Rec. (Sept. 28,1978) p. H 11107. Reprinted in 1978 U.S.C.C.A.N. p. 6550.

Section 1325(a)(5)(B)(ii) also was a compromise between the House and Senate. It was intended that unless a secured creditor accepted the plan, the intent was expressed thus:

> Unless the secured creditor accepts the plan, the plan must provide that the secured creditor retain the lien securing the creditor's allowed secured claim in addition to receiving value, as of the effective date of the plan . . . not less than the allowed amount of the claim.

Cong. Rec. (Sept. 28, 1978) p. H 11107. Reprinted 1978 U.S.C.C.A.N. p. 6550.

The most lucid expression of intent to allow interest upon arrearages was later stated by the Senate:

> Section 1325 (a) (5) (B) of the House amendment modifies the House Bill and Senate amendment to significantly protect secured creditors in chapter 13. Unless the

> secured creditor accepts the plan, the plan must provide that the secured creditor retain the lien securing the creditor's allowed secured claim in addition to receiving value as of the effective date of the plan of property to be distributed under the plan on account of the claim not less than the allowed amount of the claim. To this extent, a secured creditor in a case under chapter 13 is treated identically with a secured creditor under § 1111(b)(1) of the House amendment except that the secured creditor in a case under chapter 13 may receive any property of a value as of the effective date of the plan equal to the allowed amount of the creditor's secured claim rather than being restricted to receiving deferred cash payments . . . To the extent the deferred payments exceed the value of the allowed claim and the debtor subsequently defaults, the lien will not secure unaccrued interest represented in such deferred payments.

Cong. Rec. (October 5, 1978) p. S. 34009.

We submit there can be no clearer expression of the intent of Congress to allow interest upon deferred payments of arrearages in a chapter 13 case.

As of the time of preparation of this brief, proposals of S. 1985 which was intended to clarify that Congress did not intend any modification of home mortgages (as regards lien stripping) passed the Senate on June 17, 1992 by a vote of 97-0. H.R. 5321 is presently pending in the House. That bill as passed by the Senate provides:

> Section 1322(b)(2) of Title 11, United States

> Code, is amended by striking "claims" and inserting "claims, but the plan may not modify a claim holding a primary or a junior security interest in real property or a manufactured home ... that is the debtor's principal residence, except that the plan may modify the claim of a person holding such a junior security interest that was undersecured at the time the interest attached to the extent that the interest remains undersecured."

Any examination of the intent of Congress must include the authority of *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S. Ct. 854, 79 L. Ed. 1593 (1935). As was repeated in *Dewsnup v. Timm*, __U.S.__, 112 S. Ct. 773 (1992), Congress, when it writes a new bankruptcy act, it does not do so upon a clean slate. Also, it was held " ... that liens pass through bankruptcy unaffected." 112 S. Ct. at 778.

Radford established that whenever Congress exercises its bankruptcy power, it must do so subject to the Fifth Amendment. 295 U.S. at 589. That case examined the early historical treatment of mortgages, and to our knowledge first used the word "cure" within the context of the development of the equitable concept of redemption, saying "... the statutory command that the mortgagor should not lose his property on default had always rested on the assumption that the mortgagee would be compensated for the default by a later payment, with interest, of the debt for which the security was given; and the protection afforded the mortgagor was, in effect, the granting of a stay. No instance has been found, except under the Frazier-Lemke Act, of either a statute or decision compelling the mortgagee to relinquish the property to the mortgagor free of the lien unless the debt was paid in full." 295 U.S at 579.

Again, the matter of interest was addressed as follows:

> This right of the mortgagee to insist upon full payment before giving up his security has been deemed of the essence of a mortgage ... But practically always the measures adopted for the mortgagor's relief, including moratorium legislation enacted by the several states during the present depression resulted primarily in a stay; and the relief afforded rested, as theretofore, upon the assumption that no substantive right of the mortgagee was being impaired, since payment in full of the debt with interest would fully compensate him.

295 U.S. at 580.

It was, therefore, historical that no bankruptcy act had ever undertaken to supply the debtor with capital with which to reorganize.

The term "modify" was found in *Radford* in the context that "No bankruptcy act had undertaken to modify in the interest of either the debtor or other credltors any substantive right of the holder of a mortgage valid under federal law. 295 U.S. at 583.

Radford then discussed the fundamental rights of a mortgagee, such as the right to retain its lien until full payment, and the rights to rents and profits, the control over the property during default, and then held the clincher:

> For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, then taking of property of individual mortgagees in order to preserve the necessities of individual

> mortgagors, resort must be had to proceedings in eminent domain so that, through taxation, the burden of the relief afforded to the public interest may be borne by the public.

295 U.S. at 602.

We believe that *Radford* clearly provides the slate Congress was writing upon such that depriving a mortgagee of the fundamental right to the time value of the full payment of his mortgage debt includes the payment of interest for the forbearance thereof,

II.

NOT ALLOWING INTEREST UPON ARREARAGES IS CONTRARY TO THE EXPRESS PROVISIONS OF THE CODE.

As is most often the case, chapter 13 filings are usually races to the Courthouse in order to forestall a pending foreclosure. Usually, the filing presages the day of the sheriff's sale. The effect of the fillng under 11 U.S.C. § 362 is to modify the rights of the mortgagee by denying him his right to foreclose, his right to obtain title to the property, to later sell it or otherwise dispose of it, and to obtain a deficiency judgment. This is the permissible modification Congress intended under § 1322(b)5 which *in esse* is a "de-acceleration" of the event of default. The Debtor's plan then proposes to pay the regular payments over the life of the plan and at the same time repay the arrearages which often include court costs, attorney fees, and any advancements such as insurance, taxes, and abstracting expense. The payment of the arrearages has been accurately described by *In re Thomas*, 115 B. R. 305 (Bankr. E. D. Okla. 1990) this way:

> Since Jim Walter Homes is entitled to the

> immediate payment of its defaulted amounts and yet the Debtors intend to delay this payment over a three to five year term of a Chapter 13 Plan, the creditor cannot be expected to endure this delay in payment without additional compensation. The consideration for the interest rate provided under the original note and mortgage was the initial delay in payment caused by the loaning of the funds over the term of the note. Now, the Debtors are requesting a further delay, and for this, we find that Jim Walter Homes is entitled to interest over the term of the Plan for the payments on arrearages.

Since the memory of man runneth not to the contrary, the legal meaning of "Interest" has been defined as the compensation for the use or forbearance or detention of money. "I don't believe in princerple, But oh I du in interest." *The Bigelow Papers, Series II.*

It goes without saying the loan of money is a bargain, usually at market rates, whereby a consideration is paid for the forbearance of money over the life of the loan. The interference with this bargain is not only the modification of the right of foreclosure and acceleration of the mortgage balance but the setting of a later date for the receipt of the defaulted amounts. In setting an interest upon that "new loan" the court is continuing the benefit of the bargain to the mortgagee (although at often a lower rate than originally agreed upon).

Such was the analysis in *In re Colegrove*, 771 F.2d 119 (6th Cir. 1985). The trial court opined that allowing interest upon the arrearage was to modify the mortgage contrary to § 1322. The Sixth Circuit viewed the refusal of interest as preventing the creditor the realization of the full *present value* of the amount

owed. The Circuit viewed the allowing of interest as a mere incident to the "cure" of § 1322(b)5. Further, the Circuit viewed §§ 506(b) and 1325(a) together, noting that the former section provides for interest upon an "allowed secured claim" where the value of the security is greater than the claim; the latter directs the bankruptcy court to confirm a plan only where the creditor will receive the *present value* of the amount due him. Also, the Circuit interpreted the statutes as "making a new loan to the debtor in the amount of the current value of the collateral . . . and such creditor was entitled to interest at the current market value for similar loans at the time. While concluding that current market rate was to be applied to the delay in payments, the Circuit acknowledged that many courts applied the contract rate the parties agreed to as a fair return to the creditor for the repayment of money over a period of time. 771 F.2d at 123.

The cases to the contrary are *In re Laguna*, 944 F.2d 542 (9th Cir. 1991); *Landmark Financial Services v. Hall*, 918 F.2d 1150 (4th Cir. 1990); *Appeal of Capps*, 836 F.2d 773 (3rd Cir. 1987); *In re Terry*, 780 F.2d 894 (11th Cir. 1985) (jointly referred to hereinafter as the "*Terry* line").

What is mutual in all those case is there was no provision for post-default interest in the mortgages. In *Terry* and *Capps*, *supra*, § 506 was not argued: neither was post *Ron Pair, supra*, and each one resolved the controversy by rejecting the "present value" arguments, contending §1325(a)(5)(B) *was not applicable to residential mortages*. All four cases involved over-secured mortgages. All the cases justified the refusal to allow interest upon the reason that to do so would be a modification in violation of §1322(b)2. *Terry*, in an attempt at intellectual honesty, stated "there is no right or wrong" to the argument. 780 F.2d at 895. *Capps* went further in that it based refusal to apply §1325(a)(5)(B) upon the fact there was not a prerequisite modification of the mortgage contract. That court further concluded that §1325 was

not intended to benefit home mortgages. Where that sweeping construction is justified is a mystery.

Both *Landmark* and *Laguna, supra,* were post *Ron Pair* and involved the argument that § 506(b) called for the application of interest upon the arrearages in a Chapter 13 proceeding. *Capps* held a cure under § 1322(b)5 is not a modification of the mortgagee's rights, that § 1325 present value test is irrelevant since the mortgagee's rights have not been modified, and that § 506(b) is inapplicable in the context of mortgage cures. In excusing the application of § 506(b) the *Landmark* court said:

> The valuation of the claim or the collateral is simply immaterial when the original agreement is reinstated and the debtor elects to make all the payments called for by the agreement. The mortgagee receives only the interest and other charges to which it is entitled under the agreement and applicable non bankruptcy law.

918 F.2d at 1155.

Laguna echoed *Landmark* in holding that the present value test of §1325 is irrelevant ". . . because the creditor's rights have not been modified. Whereas the cram down route compensates the secured creditor with the present value of his collateral, the cure route reinstates the initial agreement that is the basis of the claim regardless of the value of the collateral." 944 F.2d at 544.

It is difficult to understand what the Circuits were saying when they held that (i) calling a halt to foreclosure, reversing the acceleration of debt, and otherwise abridging all of the contractual rights attendant to default of a mortgage is not a "modification" such as to call into play the allowance of present value under § 1325 and (ii) that §1325 did not apply to home mortgages.

For too long the Bankruptcy Code has been construed under broad interpretations as courts performing equity without heed to the hoary doctrine that "equity follows the law." Such conduct is thankfully being brought to a halt by this Court's interpretation of the Bankruptcy Code in *Ron Pair* and *Dewsnup v. Timm*, __U. S. __, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992). Certainly one must hope that Justice Scalia's prayer in *Patterson* that ". . . the symbol of our profession may remain the scales, not the see-saw." 112 S. Ct. at 2251.

Wade v. Hannon, 968 F.2d 1036 (10th Cir. 1992) adopted the statutory construction standard expressed in *Patterson v. Shumate*, __U.S.__, 112 S. Ct. 2242 (1992) and followed the "plain language" of the statutes without strained resort to and trying to read into the statutes what Congress intended *vis-a-vis* what Congress clearly stated.

It was truly "attention to text" that persuaded the Tenth Circuit to rule as it did in *Wade*, That case acknowledged that truly "cure" under §1322(b)5 was a modification, notwithstanding the provisions of §1322(b)(2); the case acknowledged a plain reading of § 506(b) mandated paying interest to an over-secured claim even though there is an absence of a contractual provision; and the no modification rule certainly did not abrogate the mandate of paying interest.

For the application of § 506(b) to chapter 13 plans, one must realize that a secured claim by a home mortgagee is bicornuate in that under Bankruptcy Rule 3001(a) a claim shall conform substantially to the appropriate Official Form 10. That form provides for not only setting forth the balance due on the note and mortgage but the "amount of arrearage and other charges included in" the secured claim. Nowhere in the Code does it say that part of the claim under arrearages is to be excluded of interest and other charges, such as attorney fees, court costs, and advancements by the mortgagee.

The task before us is the conceptualization of the terms "cure" and "modify." Another court that resorted to "plain meaning" analysis is *Grubbs v. Houston First American Savings Association*, 718 F.2d 694 (5th Cir. 1983) held:

> The plain language of Section 1322(b)(5)'s preface, "notwithstanding paragraph (2)" indicates to us beyond peradventure that the cure of a default is, within the meaning of the statute, a modification of the rights of a residential mortgagee unless the cure is permitted by the terms of the mortgage. Congress provided generally in (b)(2) that the rights of these mortgagees could not be modified; then, in (b)(5), recognizing that curing a default was a modification of rights, provided a limited, rather than a broad, exception to (b)(2).

718 F.2d at 698-99.

Grubbs was overturned at rehearing, in *Grubbs v. Houston First Am. Sav. Ass'n*, 730 F.2d 236 (5th Cir. 1984), although the dissenting opinion continued to adhere to the "plain meaning" analysis.

It clear that §1322(b) (5)(ii) is a codification of the practice under former chapters XI and XIII whereby the injunctive power of § 2a(15) was utilized not to modify the rights of a creditor but to postpone his remedy upon reasonable and equitable conditions to aid a rehabilitation plan. *See United States Financial Corp. v. Brantley*, 6 B R 178, 190 (Bankr. N.D. Fla. 1980). Today, however, the effect of the bankruptcy petition is to enjoin foreclosure, and under chapter 13, a plan to allow the Debtor to repay the home mortgage arrearages over the life of the plan, while on the other hand, the home mortgage lender is entitled to full repayment of the

arrearages as well as full and timely payment of the subsequent payments due under the mortgage. Under the clear terms of §1322(b)(5) a cure is not available if the mortgage has matured under its terms, the provision for cure being restricted to those mortgages where the last scheduled payment is longer than the term of the plan.

A most excellent, recent article on this subject is — Paul D. Boynton, *Claims of Home Mortgage Lenders Against Chapter 13 Debtors: Should Full Payment Include Interest on Arrearages Repaid Over Time?*, 97 Commercial Law Journal 384 (Fall 1992).

III.

THE FULL AMOUNT OF THE HOME MORTGAGE CLAIM IS THE "ALLOWED" AMOUNT FOR DISTRIBUTION UNDER THE CHAPTER 13 PLAN.

In this case, the "allowed claim" of Wade is the balance due on the mortgage and the total of the arrearages, which include interest, attorney fees, late fees, insurance advanced, if any, and taxes advanced by the mortgagee as portions of the default.[1] Section 1325(a)(5)(ii) clearly reads "the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim." Clearly, the plan must provide for time-value interest on the "allowed amount of such claim." If it were otherwise, the claim would be less than the "allowed" amount.

The only "allowed" amount for a home mortgage lender permitted under the chapter 13 plan is its full claim, because

1. The note and mortgage provide for recovery upon default of all advancements made by the mortgagee such as insurance, claims, liens, taxes, insurance, assessments, attorney fees, and costs.

anything less would contravene the "no modification" rule of § 1322(b)(2). *A fortiorari*, as a matter of law, courts must allow the full amount of the home mortgage and full payment of arrearages under a chapter 13 plan.

If it were the intent of Congress to accord special treatment to home lenders, and if it is the intent of Congress (as expressed by the compromise amendment of § 1322(b)(2)) to prevent home lenders from having their mortgages modified (other than by the cure under § 1322(b)(5)), then *Colegrove* and *Wade* comply with that intent and are more consistent with the "no modification rule" than *Terry, Capps, Landmark*, and *Laguana*.

The *Terry* line of cases totally ignores the benefit of the bargain that transpired between the debtor and the lender. In each of the mortgages at bar the parties negotiated and agreed to an interest rate of 10% *per annum*. The *Terry* line of cases are based upon the incorrect permise that allowing interest on home mortgages arrearages, absent contractual language, would provide more, or perhaps something different, to a home mortgage lender than what it bargained for. However, as held in *Colegrove*, time-value interest on arrearages cured over the course of a chapter 13 plan merely facilitates the full benefit of the bargain for home mortgage lenders in that they receive the full value of their mortgages as they are amortized over a period of time. It is facile to suggest that home mortgage lenders who fail to bargain for a specific clause providing for time-value interest on arrearages cured over the course of a chapter 13 plan should not be granted such interest merely by virtue of a chapter 13 plan. The plan delays the acceleration rights and foreclosure rights of the mortgagee. Because this lapse of time diminishes the bargained-for mortgage amount, the time-value provision of § 1325(a)(5)(ii) merely makes home mortgage lenders whole by allowing courts to fashion an interest rate that provides a sum necessary to account for the diminishing value of money as the full amount of home mortgage

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arrearages are repaid over three or five years.

There is absolutely no congressional intent nor any statutory language extant that justifies the *Terry* line of cases to carve out a special exception to the plain language of § 1325(a)(5)(ii) simply because Congress chose to exclude home mortgages from modification.

An excellent analysis on this point is found in *In re Hall*, 117 B.R. 425 (Bankr. S.D. Ind. 1990). That court applied the plain language test to the analysis and found ". . . to the extent that an allowed secured claim is over secured, the holder shall be allowed post petition interest on such claim . . . Interest is allowed even if it is not provided for by agreement between the debtor and claimant." *Citing Ron Pair.* That case contrasted §§ 506(b) and 1325(a)(5) as follows:

> 4. These two sections address related but distinct concepts. Section 506(a) states, in simple terms, that the value of an allowed secured claim is no more than the value of the collateral securing it, any claim in excess being an unsecured claim. If the value of the collateral is more than the value of the claim, the entire claim is secured, and section 506(b) allows post petition interest on these over secured claims. The value of the secured claim may vary during the course of a bankruptcy because of such things as payments made on the claim and fluctuations in the value of the collateral. *See* 3 Collier on Bankruptcy para. 506.04[1]. If post petition interest is allowed, the value of the secured claim will increase as the interest accrues, up to the value of the

> collateral. Thus, section 506 provides a method for valuing an allowed secured claim at any given time during a bankruptcy case.
>
> [2] 5. In contrast, section 1325(a)(5) requires that the holder of each secured claim, regardless of whether the claim is over secured, receive the value of the secured claim as determined as of the effective date of the plan. In evaluating a Chapter 13 plan, section 506(b) determines the allowability of post petition interest in valuing an allowed secured claim as of the effective date of the plan, while section 1325(a)(5) requires the plan to provide the present value of that secured claim, usually through present value interest, as of that date. *See In re Corliss*, 43 B.R 176 (Bankr. D. Ore. 1984). In rough terms, the issue of post petition interest is governed by section 506(b) from the date of the petition to the effective date of the plan and by section 1325(a)(5) thereafter.

The Court further attacked the *Terry* line of cases *in seriatum* as follows:

> First, interpreting the present value requirement as a component of a permissible cure rather than a forbidden contract modification gives effect to all relevant sections of the Code. A contrary interpretation would put the provision that the holder of an allowed secured claim be given the present value of its claim in direct conflict with the provision forbidding modification of a home mortgage lender's contract rights. Allowing present value interest as a component of curing

a default rather than a modification of contract rights, however, harmonizes these provisions.

[4, 5] 10. Second, the primary purpose of section 1322(b)(2) is to provide stability in the residential long-term home financing industry and market. *See In re Brantley*, 6 B.R. 178, 189 (Bankr. N.D.Fla.1980). This section is intended to protect home mortgage lenders rather than home owners. *See In re Seidel*, 752 F.2d 1382, 1985 (9th Cir. 1985). Moreover, unlike in Chapter 11 a creditor may not propose a plan, *compare* 11 U.S.C. sections 1121 and 1321, so any limitations on plan provisions must be for the benefit of creditors rather than the debtor. Thus, section 1322(b)(2) protects the rights of home mortgage lenders from such contract modifications as lowering the amount of the monthly payments or the contractual interest rate, which would otherwise be permissible, *see In re Ramirez*, 62 B.R. 668 (Bankr. S.D. Cal. 1986). Interpreting this section to deprive home mortgage lenders of present value interest to which they would otherwise be entitled under section 1325(a)(5) would harm rather than protect these lenders, and thus would be contrary to the purpose of section 1322(b)(2). The Court will not interpret a Code provision in a way that is contrary to its purpose when there is an equally, indeed more, supportable interpretation that furthers its purpose.

[6] 11. Third, in a bankruptcy case, the cure rights of mortgagees, including home mortgage lenders, are governed by federal

rather that state law. *See In re Taddeo*, 685 F.2d 24, 28-29 (2nd Cir 1982) Courts that have disallowed present value interest have concluded that no interest be allowed unless the mortgagee would have a right to interest as part of the cure under its contract with the debtor or under state law. *See Capps*, 836 F.2d at 777 *Terry*, 780 F.2d at 897. However, federal bankruptcy law has already disrupted the mortgagee's cure rights by staying foreclosure, *see* 11 U.S.C. section 362(a), which the mortgagee could have resorted to in the absence of a speedy cure. (This indeed is a "modification" of the home mortgage lender's contract rights, but one that is not barred by section 1322(b)(2) because it is the Code itself, not the plan, that effects the modification.) Section 1322(b)(5) gives the debtor the right to cure defaults through a plan while the automatic stay prevents foreclosure, and section 1325(a)(5) defines what that cure must provide the mortgagee to make up for the loss of its right to speedy foreclosure. Thus, the fact that a mortgagee may have no state law or contract right to interest on arrearages does not affect its right to present value interest under the Code.

[7] 12. Fourth, the Court disagrees with the position that the present value requirement of section 1325(a)(5) is inapplicable when contract rights have not been modified under section 1322(b)(2). *See Capps*, 836 F.2d at 776-77; *In re Laguna*, 114 B.R 214 (9th Cir. BAP 1990). This position is based in part on the reasoning that since, in Chapter 11, only

members of an impaired class of secured creditors would be entitled to the present value of their claim in a cram down, *see* 11 US.C. section 1129(b)(2)(A)(i), and a plan may render claims unimpaired by reinstating the contract terms and curing defaults without the present value requirement, *see* 11 U.S.C. section 1124(2), therefore a Chapter 13 plan that cures a default without other-wise modifying a secured creditor's contractual rights is not subject to the present value requirement. This reasoning is flawed for three reasons. First, the concept of impaired or unimpaired classes is embedded in the complexities of Chapter 11 and has no application in other chapters. See 11 U.S.C. section 103(f) . Second, the prevailing authority is that to render a class unimpaired under section 1124, cure must be made on the effective date of the plan rather than over time through the plan, so a claim in fact would be impaired and the creditor entitled to present value interest if the Chapter 11 plan proposed cure over time. *See In re Jones*, 32 B.R 951 (Bankr. D. Utah 1983); 5 Collier on Bankruptcy para. 1124.03[4]. Third, this argument proves too much, since it would deprive not just home mortgage lenders but all secured creditors of present value interest on arrearages (unless the contract or state law allowed it), as long as the contract terms are not modified under section 1322(b)(2). This may have been the practice under the old Act, *see* 5 Collier on Bankruptcy para. 1322.09[4], but the plain provisions of the Code take precedence over past practice. The Chapter 13

present value provision of section 1325(a)(5) applies by its terms to all holders of secured claims, whether or not they would be impaired in Chapter 11, whether or not they are home mortgage lenders, and whether or not their contracts rights have been modified under section 1322(b)(2).

13. Because the Debtor now admits to the figures in Lomas's Proof of Claim, Lomas's Objection to Plan must be sustained. Because the Court concludes that Lomas is entitled to present value interest, the Debtor's Objection to Claim must be overruled. Those matters having been decided, the Court will set for final hearing other pending matters. The Court will refrain at this point from setting a deadline for the Debtors to amend their Plan because resolution of the other pending matters may require further amendment.

Considering the illogical reasoning of the *Terry* line of cases, and the failure of the Courts to adhere to plain meaning of the statutes, it is not surprising that section 1322(b)(2) is being victimized by the bifurcation of home mortgages into secured and unsecured claims in order that the Debtor in a chapter 13 plan may pay all of the secured claim and write off the unsecured claim at cents on the dollar. We recognize this issue is not directly involved in this matter, but it is going to be presented at some time in the future such that comment is apt as a guide to the lower courts. For courts allowing bifurcation of home mortgages, *see In re Cardinale*, 1992 WL 166025 (Bankr. D. R.I. 1992); *In re Sainz-Dean*, 139 B.R. 739 (Bankr. D. Colo. 1992); *In re Hart*, 923 F.2d 1410 (10th Cir. 1991). *Hart* boldly holds "bifurcation is not, of itself, a 'modification' of the secured claim made impermissible by section 1322(b)(2). Indeed, the act of bifurcation recognizes, but

does not affect, the secured claim." *Hart* follows the Third and Ninth Circuits. *Contra, Matter of Nobleman*, 968 F.2d 483 (5th Cir. 1992). *Nobleman* is pending review by this Court at the time of the preparation of this brief. That case presents a cogent and rational examination of the interplay of § 506(a) and § 1322(b)(2) whereas this action involves the interplay of § 1322(b)(2) with § 506(b). Nobleman is supported by the First, Sixth, Seventh, Eighth, and Eleventh circuits.

Nobleman followed the general rule of statutory construction that a specific statute prevails over one of general application. *See Gozlon-Peretz v. United States*, __ U.S. __, 111 S. Ct. 840 (1991). *Nobleman* concluded that § 1322(b)(2) prevented bifurcation "even if the entirety of such a claim is not a secured claim (as per section 506(a)), the rights of a holder of such a claim may not be modified under section 1322(b)(2)." 968 F.2d at 488. *Nobleman* opined that its decision was in accord with legislative history which indicated Congress intended ". . . to afford some protection to the home mortgage industry." 968 F.2d at 489.

IV.

IN ABSENCE OF CONTRACTUAL PROVISIONS, OKLAHOMA LAW PROVIDES FOR INTEREST.

By constitutional provision, ". . . in contracts where no rate of interest is agreed upon, the rate shall not exceed six percent (6%) per annum." Okla. Const. Art. 14, § 2. By statute, ". . . any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt." 23 Okla. Stat. § 6 (1991). This statute provides for this interest upon liquidated damages as distinguished from unliquidated damages. *Champlin Refinery Co. v. Phillips*

Petroleum Co., 269 F.2d 993 (1954). By statute, in absence of a contractual provision, the amount of interest applied to a liquidated judgment amount is a rate equal to the average United States Treasury Bill rate plus four percentage points. 12 Okla. Stat. § 727 (1991).

There is nothing in the pertinent sections of the Bankruptcy Code that leaves such a determination of right to present value of money as interest to applicable state law. We contend this issue is preempted by federal law and one determined by reference to the applicable Code sections. Further, the amount of interest to be applied to the arrearages was never an issue in the case at bar.

The Petitioners have raised the issue that 14A Okla. Stat. §§ 1-203 and 3-107 (1991) are in some way applicable to this case. Nothing could be more erroneous, The Oklahoma Consumer Credit Code has as its essential application what is termed "consumer credit sales." The article cited by Petitioner applies only to "consumer loans." Title 14A Okla. Stat. § 2-104(2)(b) defines the exclusion of the Act by defining "consumer credit sales" as follows:

> Unless the sale is made subject to this act by agreement (Section 2-601), "consumer credit sale" does not include
>
> (b) except as provided with respect to disclosure (Section 2-301) and debtor's remedies (Section 5-201), a sale of an interest in land if the credit service charge does not exceed thirteen percent (13%) per year calculated according to the actuarial method on the unpaid balances of the amount financed on the assumption that the debt will be paid according to the agreed terms and will not be paid before the end of the agreed term

Under the article dealing with loans, 14A Okla. Stat. § 3-102 (1991) provides:

> This article applies to "consumer loans" including supervised loans.

Title 14A Okla. Stat. § 3-105 (1991) tracks the language of 2-104(2)(b) by exclusion as follows:

> Definition: "Loan primarily secured by an interest in land"
>
> Unless the loan is made subject to this act by agreement (Section 3-601), and except as provided with respect to disclosure (Section 3-301) and debtor's remedies (Section 5-201), "consumer loan" does not include a "loan secured primarily secured by an interest in land", if at the time the loan is made the value of this collateral is substantial in relation to the amount of the loan, and the loan finance charge does not exceed thirteen percent (13%) per year calculated according to the actuarial method on the unpaid balances of the principal on the assumption that the debt will be paid according to the agreed terms and will not be paid before the end of the agreed term.

The Court will observe the notes and mortgages forming the basis of Respondent's claims had their origin from Jim Walter Homes, Inc. That corporation is the builder of homes varying in stages of construction from shell homes to fully completed homes. The finance charge involved in each transaction was ten percent (10%). In a case involving identical contentions as here, that the paper and the transactions came under the terms of the Oklahoma

Consumer Credit Code, it was contended the transactions involved were sales of goods. The Tenth Circuit disagreed in *Circle v. Jim Walter Homes, Inc.*, 654 F.2d 688 (10th Cir. 1981) by holding the transactions were excluded from the Oklahoma Consumer Credit Code; that the transactions were sales of an interest in land where the finance charge was less than the percentage limitation, and quoted the official comment to the Act as follows:

> Additionally, the official comment on section 104 explains that the ten percent exclusion was intended to exclude from coverage home mortgages, while retaining UCCC coverage of the high rate, "small loan" type of real estate loan. Thus, the framers appear to have chosen the ten percent interest line as a practical division point to differentiate between the two types of transactions as applied to home building or purchase.[2]

It becomes painfully evident that much of Petitioners' reliance on state law application has now "Gone with the Wind."

Clearly, the provision in the note for a late charge applies only to the tardiness of a single installment and is not intended to compensate the mortgagee for the forbearance of large defaulted sums paid over a thirty-six or sixty month chapter 13 plan. Before the matter of time value was ever pressed by this Respondent, we asserted our contractual right to include the late charges in plan payments, and that assertion was a bloody battle finally settled by a District Court opinion which the Bankruptcy Court of the district refuses to adhere to, taking the position that opinions of the District Courts are not binding on the Bankruptcy Courts.

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2. At the time *Circle* was decided, the percentage definitional break was 10% rather than the current 13%.

CONCLUSION

By those courts which have correctly construed the congressional intent through the "compromise amendment" to § 1322(b)(2) to protect the home mortgage industry, it has been generally agreed that such protection was in recognition that the home mortgage lender industry is performing a valuable social service through their loans.

Admittedly, not allowing interest upon the arrearages in a chapter 13 plan is not as onerous as bifurcating and cram down, but still the amount of money lost to the lender by denying such a valuable claim is substantial, considering the increasing number of chapter 13 filings which more often than not include defaulted mortgages. The questions of bifurcation as well as interest upon arrearages is looming as a more important consideration to our national economy when judged in the context of increasing layoffs, the restructuring of our industrial base, and other factors which affect local economies.

If the American Dream of home ownership is to be realized in the future, the engine that drives that dream, the home lending industry, must be able to gauge their risk of loss by factors other than by defaulting loans leading to foreclosure. Where many banks and mortgage bankers as well as govemmental loan agencies are requiring no more than 20% as down payment for the purchase of a home, if the specter of modification of the mortgage claim is a consideration to be factored into the amount of loan to advance, one would be foolish to advance much money to finance a home only to be faced with bifurcation as the loan diminishes down by payment. As well, the amount of interest to be charged for the loan must also be measured by the risk of tying up large sums over a five year period of a Chapter 13 plan after a default. The usual scenario surrounding a mortgage default is the Debtor becomes several months in default, necessitating the last ditch effort on the part of

the lender to file foreclosure. Attorney fees, abstract fees, court costs, advances for insurance and taxes by the lender are incurred. It is usually on the day before sheriff's sale that a chapter 13 proceeding is filed. The claim of the lender includes these amounts as well as the mortgage balance. To deny the time value of these large defaults is a severe burden upon mortgage lenders.

The problem now is severe and will become more-so in the years to come. The chief economist for Federal National Mortgage Association, David Berson, is predicting a nine percent increase in homes sold for 1993, totaling 4.4 million homes sold. He sees a 7 percent rise in single-family housing starts next year. The home lending industry must be protected from the assaults upon their security and bargains if this economic engine is to meet the challenges and demands of the marketplace.

Therefore, those decisions of the Circuits and lower courts which have misconstrued the plain language of the statues must be reversed.

We ask the Court to affirm the decision of the Tenth Circuit.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DONALD NEAL RAKE, ET AL.,

Petitioners,

v.

WILLIAM J. WADE, TRUSTEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT:

I. BANKRUPTCY CODE SECTION 506(b) DOES NOT REQUIRE THE PAYMENT OF POST-PETITION AND PRE-CONFIRMATION INTEREST ON HOME MORTGAGE ARREARAGES IN CHAPTER 13 BANKRUPTCY PROCEEDINGS 1

II. BANKRUPTCY CODE SECTION 1325(a)(5)(B) DOES NOT REQUIRE POST-CONFIRMATION INTEREST TO BE PAID ON HOME MORTGAGE ARREARAGES 4

III. THE ISSUE OF BIFURCATION OF A HOME MORTGAGE WAS NOT PRESENTED TO ANY COURT BELOW, AND SHOULD NOT BE CONSIDERED BY THIS COURT ON CERTIORARI 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

In Re Laguna, 944 F.2d 542, (9th Cir. 1991) 1

In Re Stamper, 84 B.R. 519 (Bkrtcy. N.D.Ill. 1988) 8

Nobelman v. American Savings Bank, No. 92-641 (cert. granted December 7, 1992) 9

Taylor v. Freeland & Kronz, ____ U.S. ____, _____ L. Ed. 2d _____, 112 S.Ct. 1664, 1649 (1992) 9

United Savings Association of Texas v. Timbers of Inwood Forests Associates, Ltd., 484 U.S. 365, 98 L.Ed.2d 740, 108 S.Ct. 626 (1988) 2

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 2

Wilson v. Commonwealth Mortgage Corporation, 895 F.2d 123 (3rd Cir. 1990) 2

STATUTES:

11 U.S.C. § 103(a) 1

11 U.S.C. § 362 6

11 U.S.C. § 502(b)(2) 2

11 U.S.C. § 506 2

TABLE OF AUTHORITIES - Continued

Page

11 U.S.C. § 506(a) 8

11 U.S.C. § 506(b) 1, 3

11 U.S.C. § 722 4

11 U.S.C. § 724(b) 4

11 U.S.C. § 1126(f) 5

11 U.S.C. § 1129(a)(7) 4, 5

11 U.S.C. § 1129(a)(7)(ii) 4

11 U.S.C. § 1129(a)(8)(B) 5

11 U.S.C. § 1322(b) 2, 6, 7

11 U.S.C. § 1322(b)(2) 1, 5, 7, 8

11 U.S.C. § 1322(b)(3) 6, 7

11 U.S.C. § 1322(b)(5) 5, 6

11 U.S.C. § 1325(a)(5)(B) 4, 5, 7

SUPREME COURT RULES:

Rule 14.1(a) 9

Rule 24.1(a) 9

ARGUMENT

I. BANKRUPTCY CODE SECTION 506(b) DOES NOT REQUIRE THE PAYMENT OF POST-PETITION AND PRE-CONFIRMATION INTEREST ON HOME MORTGAGE ARREARAGES IN CHAPTER 13 BANKRUPTCY PROCEEDINGS

Petitioners contend that in order to cure an arrearage on a home mortgage[1] while in a Chapter 13 bankruptcy, no interest can be paid on such cure payments as a condition precedent to plan confirmation, unless the underlying contract documents provide for such interest. The Respondent and Amicus Curiae, United States, however, both assert that Bankruptcy Code Section 506(b) controls as to the requirement for payment of interest, by virtue of the provisions of Bankruptcy Code Section 103(a).

Petitioners assert that Code Section 506(b) is a statute of general applicability, which must be read in conjunction with the specific provisions of Chapter 13, and when thus read must be found to be controlled by the more specific provisions of Code Section 1322(b)(2). Chapter 5 of the Bankruptcy Code constitutes a part of the general framework for the administration and smooth operation of the various Bankruptcy Code provisions. This general applicability of Chapter 5 promotes Congressional intent of having a unified system of bankruptcy. The title of Chapter 5 (Creditors, Debtors and Estate) is very clearly designed to be of general application in the substantive liquidation and reorganization chapters, Chapters 7, 11, 12 and 13.

Bankruptcy Code Section 506(b) is a statute of general

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[1]Petitioners continue to use the convention established in their brief on the merits, that the term "home mortgage" is used to denote an allowed claim secured solely by a security interest in real property constituting a debtor's principal residence, as set forth in 11 U.S.C. § 1322(b)(2).

application. The Ninth Circuit Court of Appeals, in *In Re Laguna*, 944 F.2d 542, 544 (9th Cir. 1991), in discussing the application of Section 506(b), stated:

> This general right to post-petition interest is statutory and is based neither on the terms of any agreement between the parties nor on the status of the oversecured creditor's claim being either consensual or nonconsensual. *Ron Pair Enters.*, 489 U.S. at 241, 245, 109 S.Ct. at 1030, 1032. Because the provisions of section 506 apply to Chapter 13 proceedings....an oversecured creditor is ordinarily entitled to an allowance for postpetition interest on its secured claim under Chapter 13.
>
> While the above may state the general rule, an oversecured creditor's right to postpetition interest is qualified by, and must be understood in the context of, the interplay that exists between 11 U.S.C. §§ 1322(b) and 1325(a) with respect to modification and cure. (Footnotes omitted.)

With respect to the general rule in the bankruptcy context, Code Section 502(b)(2) disallows interest as a part of a proof of claim, thus stating the general rule in bankruptcy to disallow interest in its entirety. Code Section 506(b), however, modifies this general rule by permitting post-petition interest on oversecured claims. See, *United Savings Association of Texas v. Timbers of Inwood Forests Associates, Ltd.*, 484 U.S. 365, 373, 98 L.Ed.2d 740, 749, 108 S.Ct. 626 (1988).

The United States Court of Appeals for the Third Circuit, in *Wilson v. Commonwealth Mortgage Corporation*, 895 F.2d 123 (3rd Cir. 1990) has construed Code Section 506 to be a section of "general applicability" and controlled by the more specific provisions found in Section 1322(b)(2).

Even if Section 506(b) were held to apply in the present consolidated matters, no reading of that section specifies any particular rate of interest which must be allowed. Petitioners assert that any determination of the amount or rate of interest which must be paid pursuant to Section 506(b) must be exclusively determined pursuant to Bankruptcy Code Section 1322(b)(2), and that this rate must be the bargained for contract amount, both as to maintained payments and arrearage. That is, in the matters before this Court for consolidated review, the parties bargained for two separate and distinct amounts to compensate the Respondent for his loss of use of money: first, the internal interest rate which is not set forth in the underlying documents (J.A. 8, 24) but is admitted by Respondent to exist (Res. Br. 26); and second, a specified amount for late charges, which in the matters consolidated for review before this Court, are one-time charges, unrelated to the length of duration of such delinquent installments (J.A. 8, 22).

By reason of the limitations on Code Section 506(b) by Section 1322(b)(2), which prohibits modification of home mortgage claims in Chapter 13 plans, Congress has established the outer limits of interest which must be paid on home mortgage secured claims in a Chapter 13 proceeding to be that interest provided for in the underlying contract documents.

The Respondent should not be permitted to avoid the natural consequences of his assignor's contracts of adhesion by promoting a misconstruction of Code Section 506(b), as his own contract documents provide for payment in the form of a late charge on delinquencies, which fully compensates the Respondent, in the manner which his assignor selected, for the loss of time value of money on delinquent installments.

II. BANKRUPTCY CODE SECTION 1325(a)(5)(B) DOES NOT REQUIRE POST-CONFIRMATION INTEREST TO BE PAID ON HOME MORTGAGE ARREARAGES

Code Section 1325(a)(5)(B) has been widely held to be the Chapter 13 equivalent of "cram down", a term implying impairment of a claim under Chapter 11 and modification of a claim in Chapter 13. Code Section 1129(a)(7) is the functional equivalent, in a Chapter 11 reorganization, to Code Section 1325(a)(5)(B). Both, in essence, require the secured creditors in these rehabilitation chapters to retain their security interests and be paid in a stream of payments equal to the present value of the secured claim as of the date of confirmation.

The concept of "cram down" in bankruptcy, both in Chapters 11 and 13, contemplates retention of security interests, an impairment or modification of rights of the secured claimant, and a full payment of the allowed secured claim within the limits of the rehabilitation plan term. Code Section 1325(a)(5)(B) specifically requires that the holder of an allowed secured claim retain the lien securing such claim.

Code Section 1129(a)(7)(ii) requires that in order to confirm a Chapter 11 plan involving "cram down", the affected claimant must receive at least an amount equal to or in excess of that which the claimant would have received had the case been administered under Chapter 7 of the Code. By reference to the provisions of Chapter 7 of the Bankruptcy Code, specifically Sections 722 and 724(b), it is clear that the holder of an allowed secured claim in a Chapter 11 "cram down" shall retain his lien, as this would be required in order that the secured Claimant be assured of receiving property of a value, as of the effective date of the plan, that is not less than the amount such holder would have received had the debtor been liquidated under Chapter 7.

The "cram down" provisions of Chapters 11 and 13 are also similar as to the requirement for impairment (Chapter 11) or modification (Chapter 13) of an allowed secured claim. In a Chapter

11 proceeding, the holder of an allowed secured claim can only be "crammed down" under Section 1129(a)(7) if such holder is impaired under the plan, Section 1129(a)(8)(B). If a Chapter 11 secured Claimant is unimpaired, the claimant is conclusively deemed to have accepted the provisions of such Chapter 11 plan of reorganization and is not permitted to cast a ballot on such plan. 11 U.S.C. § 1126(f).

Similarly, in the context of Chapter 13, "cram down" must necessarily follow modification of an allowed secured claim. Code Section 1322(b)(2) permits modification of all secured claims, other than home mortgages. Section 1325(a)(5)(B) requires all holders of allowed secured claims to be paid the present value of such claims, which implies the payment of interest. If any allowed secured claim is not modified in a Chapter 13 plan (whether or not such claim constitutes a home mortgage) the terms of the underlying agreement remain fully in place, including all provisions relating to interest. Thus, all nonmodified secured claims treated in a Chapter 13 plan are paid with interest, as required by Section 1325(a)(5)(B). It is clear, therefore, that Congress intended that modification or "cram down" of a secured claim in Chapter 13 not be permitted unless accompanied by appropriate interest payments. Where the secured claim is not modified, no such protection is needed and Section 1325(a)(5)(B) is not invoked.

Therefore, Section 1325(a)(5)(B) applies only to secured claims which have been modified in the Chapter 13 plan, and which, by reason of Section 1322(b)(2), may not include home mortgages. It should be noted at this juncture that the provisions in Section 1322(b)(5) permitting cure of default on a long term debt, including most home mortgages, does not constitute a prohibited plan modification, but is imposed by the Bankruptcy Code itself.

In a Chapter 13 proceeding, the curing of a default of any claim is effected through one of two provisions found in Section 1322(b), either paragraph 3 or paragraph 5. Both of these provisions

contemplate full reinstatement of contract terms, other than the necessary overlay of the automatic stay applicable to all bankruptcy proceedings, 11 U.S.C. § 362.

In both Sections 1322(b)(3) and 1322(b)(5), the term "cure" is used to indicate the right of Chapter 13 debtors to reinstate underlying contract document terms. The word "cure" in both paragraphs of the same subsection are *in pari materia*. The meaning of "cure" in paragraph 3 of the subsection is best determined by review of paragraph 5 of the same subsection. Section 1322(b)(5) permits the curing of any default within a reasonable time while payments are maintained. Maintenance of payments, in the context of a cure under Section 1322(b)(5), necessarily implies a return to original contract terms. Otherwise, a modified payment could not be maintained -- it would merely be commenced. To maintain payments in a Section 1322(b)(5) cure is to continue with the same payment, under the same rate of interest and the same principal indebtedness as existed on the eve of filing the bankruptcy petition. Section 1322(b)(5) is limited in its application, however, to long term debts, that is, those debts which would not mature in accordance with their document terms until after completion of the Chapter 13 plan. A cure under Section 1322(b)(3), on the other hand, must, of necessity, imply curing short term claims, or those debts which would mature by their underlying terms prior to the termination of the Chapter 13 plan. Otherwise, there is no purpose including the word "cure" in Section 1322(b)(3), and its inclusion is a clear indication of Congressional intent that both short and long term debt defaults may be cured in a Chapter 13 proceeding. However, there is no indication that either cure would be accompanied by any modification of the underlying contract documents.

Since the underlying contract document terms are reinstated in a cure scenario, whether cure is accomplished as a 1322(b)(3) short term debt cure or a 1322(b)(5) long term debt cure, there is no invocation of the provisions of Section 1325(a)(5)(B), as no modification of the underlying contract terms takes place where cure

is invoked under Section 1322(b).

There is an additional reason why a cure under Section 1322(b)(3) would not involve a "cram down" modification as contemplated in Section 1325(a)(5)(B). A modification of a claim under Section 1322(b)(2) does not require cure. If a debt would normally mature by its terms within the term of a Chapter 13 plan, modification of such claim under Section 1322(b)(2) could normally be effected without curing any existing defaults under Section 1322(b)(3), which is a permissive paragraph. Both to modify a claim under Section 1322(b)(2) and simultaneously cure under Section 1322(b)(3) constitutes an additional financial burden to the future income stream devoted to the Chapter 13 plan by the debtors. This additional burden would be borne either by the debtors or their unsecured creditors. Thus, it is never to the advantage of either Chapter 13 debtors or their general unsecured creditors to propose a Section 1322(b)(3) short term debt cure when the same claim could be modified under Section 1322(b)(2).

This clearly points out that cure under Chapter 13 does not equate with "cram down", and the terms are mutually exclusive.

There is, however, a valid purpose for permitting curing of defaults on short term debt in Chapter 13. In those instances in which a home mortgage would fully mature by its terms within the length of a plan term (such as a short term second home mortgage), the prohibition of Section 1322(b)(2) against home mortgage modification would still prohibit "cram down" of such claim. In this instance, a cure of default on short term debt, as permitted in Section 1322(b)(3) could be utilized by Chapter 13 debtors to preserve possessory and title interests in their homestead. Again, Section 1325(a)(5)(B) is not invoked in this scenario, and the contract terms relating to interest, including arrearage interest as calculated by contract document delinquency penalties, are fully reinstated in the Chapter 13 plan.

In its amicus curiae brief, the United States presents a disingenuous argument that the prohibition on home mortgage modifications contained in Section 1322(b)(2) was intended by Congress to prohibit "modification harmful to the creditor" (U.S. Am. Cur. Br. 14). The plain language of Section 1322(b)(2) prohibits "all" modifications to home mortgages, whether the same are detrimental or beneficial to the secured claimant. See, *In Re Stamper*, 84 B.R. 519, 522 (Bkrtcy. N.D.Ill. 1988).

III. THE ISSUE OF BIFURCATION OF A HOME MORTGAGE WAS NOT PRESENTED TO ANY COURT BELOW, AND SHOULD NOT BE CONSIDERED BY THIS COURT ON CERTIORARI

Petitioners were alerted to the attempt by Respondent to expand the scope of this Court's review in the Respondent's Brief in Opposition to Petition for Writ of Certiorari. In it, at page 3, Respondent rails against the perceived inequities of the practice of some Circuits to permit bifurcation of home mortgages in a Chapter 13 context.

Respondent continues his attempt to expand the scope of review before this Court in his brief on the merits, (Res. Br. 23).

The Joint Appendix, setting forth the Chapter 13 plans of the Petitioners verbatim (J.A. 3, 19), clearly demonstrate that no attempt at bifurcation was made in the Bankruptcy Court. Nor was there any attempt to present bifurcation on the part of any party hereto to the Bankruptcy Court, the District Court, or the United States Court of Appeals for the Tenth Circuit. In fact, Petitioners admit that the claims of the Respondent in their respective cases are oversecured, which would absolutely prevent bifurcation under 11 U.S.C. § 506(a). Nonetheless, the Respondent feels compelled to assert that "[w]e recognize this issue [home mortgage bifurcation] is not directly involved in this matter but it is going to be presented sometime in the

future such that comment is apt as a guide to the lower courts", (Res. Br. 23).

This Court, in the recent bankruptcy decision of *Taylor v. Freeland & Kronz*, ____ U.S. ____, _____ L. Ed. 2d _____, 112 S.Ct. 1664, 1649 (1992) stated:

> Our Rule 14.1(a) makes clear that "[o]nly the questions set forth in the Petition [for certiorari] or fairly included therein, will be considered by the Court," and our Rule 24.1(a) states that a Brief on the Merits should not "raise additional questions or change the substance of the questions already presented" in the Petition.
>
> ....
>
> In addition, we have said that "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]." .... These principles help to maintain the integrity of the process of certiorari. .... The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system. We see no "unusual circumstances" that warrant addressing [Respondent's] argument at this time. (Citations omitted)

The Petitioners suggest that, as this Court has granted a writ of certiorari in *Nobelman v. American Savings Bank*, No. 92-641 (December 7, 1992), Respondent would be well-advised to seek leave of this Court to file an amicus curiae brief supporting the position of the Respondent in that matter.

CONCLUSION

There are strong policy reasons favoring the position of the Petitioners. If holders of claims secured by home mortgages feel themselves to be unfairly dealt with in Chapter 13 plans with regard to the length of time proposed for curing arrearages, such Claimants should object to those plans as not curing the defaults within a reasonable time. The Bankruptcy Court is in the best of all possible positions, on a case by case basis, to balance the competing interests of home mortgagees and other parties in interest, principally debtors and holders of unsecured claims, regarding what would constitute a reasonable time to effect cure in a Chapter 13 plan. The nature of the bankruptcy system is such as to constantly seek a balancing of the competing equities utilizing the scarce resources of debtors in rehabilitation Chapters. The framework established by Congress in Chapter 13 is clear and the plain meaning of all relevant statutes may be harmonized by denying interests incident to the cure of a home mortgage arrearage in a Chapter 13 plan, where the underlying contract documents fail to provide for a continuing rate of interest on delinquent installments until paid.

The decision of the United States Court of Appeals for the Tenth Circuit resulting in this review should be reversed.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

The United States will address the following question:

Whether the Bankruptcy Code requires payment of interest to oversecured creditors when a Chapter 13 case defers their right to collect past-due payments.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statutory provisions involved	2
Statement	2
Introduction and summary of argument	5
Argument:	
Chapter 13 of the Bankruptcy Code requires payment of interest to an oversecured creditor when a Chapter 13 case defers the creditor's right to collect past-due payments	9
A. Sections 506(b) and 1325(a)(5) of the Bankruptcy Code require payment of interest to all oversecured creditors whose rights to collect past-due payments are deferred by the bankruptcy filing	9
B. Sections 1322(b) and 1325 of the Bankruptcy Code do not prohibit interest payments to holders of home mortgages	12
C. The treatment of secured creditors before passage of the Bankruptcy Code does not support a bar on interest payments to oversecured creditors adversely affected by a Chapter 13 plan	18
Conclusion	21
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Capps, In re, 836 F.2d 773 (3d Cir. 1987)	13, 18
Cardinal Federal Savings & Loan Ass'n v. *Colegrove (In re Colegrove)*, 771 F.2d 119 (6th Cir. 1985)	13
Foster Mortgage Corp. v. *Terry (In re Terry)*, 780 F.2d 894 (11th Cir. 1986)	13

Cases—Continued: Page

Garrett, In re, 203 F. Supp. 459 (N.D. Ala. 1962) 18
Hallenbeck v. *Penn Mutual Life Insurance Co.*, 323 F.2d 566 (4th Cir. 1963) 18
Johnson v. *Home State Bank*, 111 S. Ct. 2150 (1991) 9
Landmark Financial Services v. *Hall*, 918 F.2d 1150 (4th Cir. 1990) 13
Nobleman v. *American Savings Bank*, cert. granted, No. 92-641 (Dec. 7, 1992) 14
Pennsylvania Department of Public Welfare v. *Davenport*, 495 U.S. 552 (1990) 9
Shearson Lehman Mortgage Corp. v. *Laguna (In re Laguna)*, 944 F.2d 542 (9th Cir. 1991), cert. denied, 112 S. Ct. 1577 (1992) 13
United States v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989) 6, 10, 19

Constitution, statutes, and rule:

U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) 16
Bankruptcy Act, § 652(1), 11 U.S.C. 1052(1) (1976) 8, 20
Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
Ch. 1, §§ 101-109, 11 U.S.C. 101-109:
§ 101(4)(A), 11 U.S.C. 101(4)(A) 9
§ 103(a), 11 U.S.C. 103(a) 15
§ 109(e), 11 U.S.C. 109(e) 5
Ch. 5, §§ 501-559, 11 U.S.C. 501-559:
§ 502, 11 U.S.C. 502 10
§ 502(a), 11 U.S.C. 502(a) 9
§ 502(b), 11 U.S.C. 502(b) 9
§ 506(a), 11 U.S.C. 506(a) 6
§ 506(b), 11 U.S.C. 506(b) ..... *passim*
Ch. 13, §§ 1301-1330, 11 U.S.C. 1301-1330 5
§ 1322, 11 U.S.C. 1322 13
§ 1322(b), 11 U.S.C. 1322(b) 6, 12, 1a
§ 1322(b)(2), 11 U.S.C. 1322(b)(2) 2, 6, 7, 13, 14, 15, 17, 1a

Statutes and rule—Continued: Page

§ 1322(b)(5), 11 U.S.C. 1322(b)(5) 2, 5, 7, 13, 14, 15, 16, 17, 1a
§ 1325, 11 U.S.C. 1325 ..... 12, 13
§ 1325(a), 11 U.S.C. 1325(a) 11
§ 1325(a)(5), 11 U.S.C. 1325(a)(5) ..... *passim*
§ 1325(a)(5)(B)(i), 11 U.S.C. 1325(a)(5)(B)(i) 11
§ 1325(a)(5)(B)(ii), 11 U.S.C. 1325(a)(5)(B)(ii) 11, 16
Sup. Ct. R. 12.4 3

Miscellaneous:

5 *Collier on Bankruptcy* (Lawrence P. King 15th ed. 1992 & Supp. 1992) 18, 20
124 Cong. Rec. (1978):
p. 32,409 18
p. 34,009 18
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S. 2266, 95th Cong., 2d Sess. (1978) 17
S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 17
Elizabeth Warren and Jay Lawrence Westbrook, *The Law of Debtors and Creditors* (2d ed. 1991) 12

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the Bankruptcy Code requires payment of interest to oversecured home mortgage lienholders to compensate them for the delay they suffer when a Chapter 13 case defers their right to collect past-due payments. The Court's analysis of that question is likely to affect the availability of interest to all oversecured creditors in Chapter 13 cases. That underlying question is of great interest to the United States because its resolution will affect the availability of interest payments to any creditor holding a long-term obligation against a

debtor that goes through a Chapter 13 bankruptcy, and because various agencies of the federal government—including the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Small Business Administration, the Farmers Home Administration, and the Department of Veterans Affairs—frequently hold such claims.

STATUTORY PROVISIONS INVOLVED

Sections 506(b), 1322(b)(2) and 1322(b)(5), and 1325(a)(5) of the Bankruptcy Code, 11 U.S.C. 506(b), 1322(b)(2) and (5), and 1325(a)(5), are set forth in an appendix, *infra*, 1a-2a.

STATEMENT

1. This case arises out of three separate bankruptcy cases in the United States Bankruptcy Court for the Northern District of Oklahoma. In each case, the debtor at the time of the filing was in arrears on a long-term promissory note held by respondent, payment of which was secured by a home with a value greater than the outstanding balance on the note. The bankruptcy court in each case approved a plan under which the debtor would continue to make current payments due under the note and would cure the arrearages by a schedule of monthly payments over the term of the plan, without interest. For example, the plan approved for petitioners Donald and Linda Rake allowed them to cure $1800 of arrearages by 24 monthly payments of $75 each. J.A. 4; see Pet. App. A13-A15. The plan approved for petitioners Ernest and Mary Yell allowed them to cure $866 of arrearages by 48 monthly payments of $18.04 each. J.A. 20; see Pet. App. A16-A17. Finally, the plan approved for

Ronnie and Rosetta Hannon [1] allowed them to cure $1513.80 of arrearages by 60 monthly payments. Pet. App. A9; see *id.* at A7-A12.[2]

2. Respondent appealed the three cases to the district court, which consolidated them and affirmed. Pet. App. A18-A25. The district court noted that the Sixth Circuit had held that oversecured creditors in Chapter 13 cases are entitled to interest on arrearages on home mortgages, but chose instead to follow the Ninth Circuit's rule, which bars payment of interest in such cases. *Id.* at A-19-A24. The court concluded:

> Congress determined the treatment to be afforded the curing of defaults in Chapter 13 proceedings in §§ 1322(b)(2) and 1322(b)(5). These sections do not alter the contract between the parties governing such matters as the interest, if any, to be paid on arrearage. Since the contracts between the parties in the appeals at issue provide that penalties for late payments are limited to 5%, not to exceed $5 per delinquent payment, any other amount of interest would be improper.

Id. at A24.

3. The court of appeals reversed. Pet. App. A26-A40. The court explained that decisions barring the payment of interest rest on three propositions, none of which it found to be persuasive. First, the court

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[1] Because the Hannons did not join in the petition, they are respondents in this Court under this Court's Rule 12.4.

[2] The Hannons' plan did allow for interest with respect to sums due the lienholder for insurance and taxes, because the mortgage expressly provided for payment of interest on delinquent sums of that sort. Pet. App. A9.

rejected the notion that a plan granting a borrower an extended time period to cure defaults does not modify the mortgagee's rights under its contract; the court found it insupportable to conclude that "abrogating cure periods, acceleration clauses, and foreclosure rights under a contract is not [modification]." *Id.* at A36-A37. Second, the court rejected the notion that "mortgagees are responsible for their losses because they did not protect themselves by adding a provision in their contracts requiring interest on arrearages." *Id.* at A37. The court noted that the plans at issue here

> alter[ed] material terms of the contractual cure, changing the very essence of the cure * * * [by] permitting arrearages to be paid over time instead of as one lump sum, and denying the foreclosure remedy the mortgagees typically would use to recover their money quickly * * *. It seems wholly unreasonable to eviscerate the contract provisions of acceleration and foreclosure and then find binding the absence of a term regarding interest on arrearages.

Ibid. Finally, the court rejected the reliance of other courts on "legislative history and presumed congressional intent without making any express finding that the Bankruptcy Code is ambiguous on the interest question." *Id.* at A38-A39. The court stated that it did "not perceive any ambiguity in the statute that permits resort to legislative history," and, in any event, that the legislative history is not helpful because it contains "no reference to interest or arrearages, or anything that would require these creditors to be treated less charitably than other over-secured creditors." *Id.* at A39. Accordingly, the court

> join[ed] the Sixth Circuit in holding that in Chapter 13 plans, an over-secured mortgagee of the debtor's personal residence is entitled to post-petition interest on arrearages and other charges even if the mortgage instruments are silent on the subject and state law would not require interest to be paid.

Id. at A40.

INTRODUCTION AND SUMMARY OF ARGUMENT

Chapter 13 of the Bankruptcy Code, 11 U.S.C. 1301-1330, establishes a process for adjustment of the debts of individuals with regular income. Pursuant to 11 U.S.C. 109(e), relief under Chapter 13 generally is available only to individuals "with regular income" who, on the date of filing, owe less than $100,000 of unsecured debts and less than $350,000 of secured debts. Chapter 13 allows individuals to reorganize their debts by obtaining judicial approval of a plan adjusting their obligations.

One significant power that Chapter 13 grants to debtors is the right to cure defaults on long-term debts pursuant to Section 1322(b)(5). That provision—limited to debts "on which the last payment is due after the date on which the final payment under the plan is due"—states that a Chapter 13 plan may "provide for the curing of any default within a reasonable time," but only if the plan also provides for "maintenance of payments while the case is pending." Accordingly, debtors regularly have proposed plans, such as the plans at issue here, that include provisions requiring a default on a long-term debt to be cured by scheduled payments over a period of

months or years.[3] The question in this case is whether, in the absence of a specific agreement of the parties, the Bankruptcy Code requires such a plan to compensate the creditor for the delay in receiving payment of the arrearages.

1. Because the value of the collateral securing repayment of the mortgages at issue in this case exceeds the amount of the debts owed to respondent, respondent has an allowed secured claim for the entire amount of the arrearages under Section 506(a) of the Code. Similarly, to the extent the value of the collateral exceeds the total amounts due to respondent at the time of filing, Section 506(b) of the Code, as interpreted in *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-249 (1989), grants respondent a right, without regard to any preexisting agreements, to interest on its claims during the period while the court develops a plan for adjusting petitioners' debts. Finally, because respondent's claims are "provided for by the plan[s]" at issue in this case, Section 1325(a)(5), respondent is entitled to interest on those claims under the plans, to compensate him for the delay imposed by the plans on his right to collect payment.

2. Nothing in Section 1322(b) justifies a different result for home mortgage lienholders. Section 1322(b)(2) does prohibit plans that modify the rights of home mortgage lienholders, but that provision was intended only to prevent detrimental modifications

[3] Although we doubt that the plans in this case required the defaults to be cured "within a reasonable time"—the plans allowed the defaults to be cured over periods as long as five years—that question is not within the scope of the review granted by this Court. See Pet. i (setting forth questions presented).

of the rights of home mortgage lienholders. Moreover, Section 1322(b)(5) provides a specific exception from Section 1322(b)(2), permitting whatever modifications are necessary to permit debtors to effect a cure of pre-petition defaults within a reasonable time. To the extent other provisions of the Bankruptcy Code require the debtor to pay interest as part of the cure permitted by Section 1322(b)(5), the requirement that home mortgage lienholders pay interest does not violate Section 1322(b)(2).

Nor does Section 1322(b)(5) implicitly repeal Section 506(b) with respect to cures of long-term debts in Chapter 13 cases. On its face, Section 506(b) requires courts to allow a claim for interest to compensate oversecured creditors for the delay occasioned by the pendency of a bankruptcy case. Section 1322(b)(5) is not in tension with Section 506(b) in any way. It simply provides that debtors can cure arrearages on certain long-term debts; it does not establish the terms of the cure or override other provisions of the Code that require monetary payments to secured creditors to compensate them for the delay in payment occasioned by bankruptcy cases.

Similarly, there is no basis in the Code for the position that an oversecured creditor whose claim is affected by a cure under Section 1322(b)(5) is not entitled to protection under Section 1325(a)(5). Section 1325(a)(5) applies to all claims "provided for" by the plan. When a plan defers a creditor's contractual right to seek immediate payment, it plainly "provide[s] for" the claim. Accordingly, whenever a plan allows a debtor to cure a default on an allowed secured claim by payments extending beyond confirmation, the creditor is entitled to compensation under Section 1325(a)(5).

3. Finally, practice under the old Bankruptcy Act does not support a contrary result. This Court in *Ron Pair* addressed the question of preconfirmation interest and concluded that Section 506(b) requires payment of such interest. With respect to postconfirmation interest, it is clear that courts in a case under the old Chapter XIII could not have forced a secured creditor to accept any plan allowing a debtor to repay past-due arrearages over time without interest, because a court could not approve any plan without the approval of all secured creditors "dealt with by the plan." 11 U.S.C. 1052(1) (1976). Because Congress plainly rejected that rule when it enacted Section 1325(a)(5) of the Code—which allows approval of a plan over the objection of the secured creditor if, *inter alia*, the creditor receives payments equal to the value of his collateral—the pre-Code rule has little probative value in determining the scope of the existing law. But it cannot support a rule allowing courts to approve plans that do not provide for the holders of allowed secured claims to receive payments having a present value equal to the value of those claims.

ARGUMENT

CHAPTER 13 OF THE BANKRUPTCY CODE REQUIRES PAYMENT OF INTEREST TO AN OVERSECURED CREDITOR WHEN A CHAPTER 13 CASE DEFERS THE CREDITOR'S RIGHT TO COLLECT PAST-DUE PAYMENTS

A. Sections 506(b) And 1325(a)(5) Of The Bankruptcy Code Require Payment Of Interest To All Oversecured Creditors Whose Rights To Collect Past-Due Payments Are Deferred By The Bankruptcy Filing

The statutory analysis starts by characterizing the claim, which involves three steps. First, the creditor's right to receive payment of arrearages that are outstanding on the date the bankruptcy is filed is a "claim" for purposes of Section 101(4)(A).[4] Second, unless a party objects on the basis of one of the grounds set forth in Section 502(b), the claim will be allowed under Section 502(a). Third, if the value of the collateral exceeds the amount of the claims secured by the collateral, the claim will be an allowed secured claim under section 506(a).

The next question under the statute is whether the creditor is entitled to interest from the date the case is filed until the effective date of the plan ("preconfirmation" interest). As this Court has made clear,

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[4] That provision defines "claim" to include any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." As the Court has noted, "Congress intended by this language to adopt the broadest available definition of 'claim.'" *Johnson* v. *Home State Bank*, 111 S. Ct. 2150, 2154 (1991); see *Pennsylvania Department of Public Welfare* v. *Davenport*, 495 U.S. 552, 558 (1990) (discussing legislative history).

Section 506(b) resolves that question by granting an allowed claim for interest to oversecured creditors holding allowed secured claims, without regard to the provisions of any agreement between the creditor and the debtor. See *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-249 (1989).[5] That provision makes sense because, at least with respect to oversecured creditors, it is only fair to compensate the creditor for the time value of money it has lost by having its rights to pursue the collateral deferred by the pendency of the bankruptcy case. Accordingly, unless the debtor pays interest on the arrearages during the period between the bankruptcy filing and the effective date of the plan, the amount of the creditor's allowed secured claim for arrearages will increase during the adjudication of the case to include interest accruing on the arrearages during that time period.[6]

[5] See Lynn M. LoPucki, *Strategies for Creditors in Bankruptcy Proceedings* § 16.4.9, at 929-930 (2d ed. 1991) (discussing the availability of preconfirmation interest under Chapter 13 in light of *Ron Pair*) [hereinafter LoPucki]. Of course, the creditor is entitled to interest only "to the extent" that the value of the property exceeds the claim, so interest would stop accruing when the total amount due on the claim equalled the value of the collateral. See LoPucki, *supra*, at 930.

[6] Petitioners contend (Pet. Br. 21-22) that even if Section 506(b) allows interest on the underlying debt, it does not allow interest on other charges due to the creditor under the agreement. That contention is incorrect. Section 506(b) applies to a creditor who has "an allowed secured claim," and provides for "interest on such claim." Hence, to the extent the creditor has an allowed secured claim for charges other than the original debt—a matter that depends on the contract of the parties and Section 502—it is entitled to preconfirmation interest under Section 506(b).

The final question is whether the creditor is entitled to interest after the effective date of any plan confirmed by the bankruptcy court ("postconfirmation" interest).[7] The answer to that question appears in Section 1325(a), which, among other things, sets forth the minimum amounts a plan must pay creditors to be confirmable under Chapter 13. In particular, Section 1325(a)(5) provides, with respect to any "allowed secured claim provided for by the plan," that the debtor may retain the collateral over the creditor's objection only if the plan provides for two things: (a) that the creditor retain its lien, Section 1325(a)(5)(B)(i), and (b) a schedule of payments with a discounted present value equal to the total amount of the creditor's allowed secured claim as of the effective date of the plan, Section 1325(a)(5)(B)(ii).[8]

[7] Although Section 506(b) on its face does not state that its effect is limited to the period before confirmation, the structure of the provision seems to require that conclusion. Because the provision has the effect of allowing a claim to the creditor, and because no new claims can be allowed to the creditor after the plan is confirmed, it seems clear that the rights granted under Section 506(b) are relevant only until confirmation of the plan.

[8] Section 1325(a)(5)(B)(ii) requires that "the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim." As a general matter, this effectively requires the payment of some form of interest to compensate the creditor for the delay imposed by the plan, because a stream of payments over time in a total amount equal to the amount of the allowed secured claim would have a lower "value, as of the effective date of the plan," than a single payment on the effective date in the amount of the allowed secured claim. As Professors Warren and Westbrook explain:

As discussed above, the creditor's claim for arrearages is an "allowed secured claim." Pursuant to Section 506(b), the amount of that claim is augmented (to the extent the creditor is oversecured) by an allowed secured claim for interest accruing during the period the case is adjudicated. Finally, the claim is "provided for by the plan," because the plan establishes a schedule of payments to cover the claim. Accordingly, Section 1325(a)(5) by its terms entitles the creditor to compensation for the deferral the plan imposes on the credtiors' right to collect the arrearages.

B. Sections 1322(b) and 1325 Of The Bankruptcy Code Do Not Prohibit Interest Payments To Holders Of Home Mortgages

The arguments offered by petitioners and the lower court decisions denying interest rest on three propositions about Sections 1322(b) and 1325: (1) payment of interest to a home mortgage lienholder that is not required by a contract with the lienholder constitutes

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The concept of "present value" [in Section 1325(a)(5)(B)(ii)] reflects the elementary proposition that a dollar paid a year from now is worth less than a dollar paid now. Absent bankruptcy, the secured creditor would be allowed to repossess and sell the collateral today. The creditor would then have that money available for another investment. Because the creditor receives deferred payments over time, the Code gives the creditor the right to receive interest on that amount.

Elizabeth Warren and Jay Lawrence Westbrook, *The Law of Debtors and Creditors* 312 (2d ed. 1991). For descriptions of the process of calculating the precise amount due to creditors under the provision, see *id.* at 312-313; LoPucki, *supra* note 5, § 16.8.2, at 957-960.

a modification of the creditor's rights somehow forbidden by Section 1322(b)(2);[9] Section 1322(b)(5) implicitly bars the payment of preconfirmation interest pursuant to Section 506(b);[10] or (3) Section 1325(a)(5) only protects a creditor whose rights are modified and does not apply when the debtor "cures" the default under Section 1322(b)(5).[11] None of those propositions is consistent with the language and structure of Sections 1322 and 1325.

1. Section 1322(b)(2) establishes a general rule that a Chapter 13 plan may not alter the rights of a secured creditor whose collateral is a debtor's home, by providing that a Chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." But Section 1322(b)(5) creates a significant exception to the rule set forth in Section 1322(b)(2), providing that "notwithstanding paragarph (2) of this subsection," the plan may "provide for the curing of any default [on a long-term debt] within a reasonable time." In sum,

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[9] See *Foster Mortgage Corp.* v. *Terry (In re Terry)*, 780 F.2d 894, 896-897 (11th Cir. 1986); *Landmark Financial Services* v. *Hall*, 918 F.2d 1150, 1154 (4th Cir. 1990); see also *Cardinal Federal Savings & Loan Ass'n* v. *Colegrove (In re Colegrove)*, 771 F.2d 119, 123-124 (6th Cir. 1985) (Celebrezze, J., dissenting). Petitioners apparently do not press that argument.

[10] See Pet. Br. 9-11.

[11] See Pet. Br. 14-17; *Shearson Lehman Mortgage Corp.* v. *Laguna (In re Laguna)*, 944 F.2d 542, 544-545 (9th Cir. 1991), cert. denied, 112 S. Ct. 1577 (1992); *Hall*, 918 F.2d at 1153-1154; *In re Capps*, 836 F.2d 773, 775-776 (3d Cir. 1987).

although Section 1322(b)(2) generally prohibits Chapter 13 plans that modify the rights of home mortgage lienholders,[12] Section 1322(b)(5) does allow modifications necessary to allow the debtor to cure any default within a reasonable time.

Those provisions cannot plausibly be read to prohibit the payment of interest called for by other provisions of the Code. First, Section 1322(b)(2) was directed at modifications harmful to the creditor; it seems most unlikely that Congress intended that provision to bar plans that increased the rights of a creditor. Moreover, even if the payment of the interest at issue in this case were construed to be a modification covered by Section 1322(b)(2), it would be permitted by the express terms of Section 1322(b)(5), which permits a plan to provide for a cure "notwithstanding [Section 1322(b)(2)]." To the extent other provisions of Title 11—in particular, Sections 506(b) and 1325(a)(5)—require the debtor to compensate the creditor for the delay occasioned by the passage of time before the default is cured, a provision requiring the payment of interest is a necessary part of the cure permitted by Section 1322(b)(5). Accordingly, Section 1322(b)(2) does not bar the payment of interest.

2. Section 1322(b)(5) permits a plan to "provide for the curing of any default within a reasonable time." Petitioners argue (Pet. Br. 9-11) that by permitting debtors to cure defaults, the Code implicitly bars the payment of interest otherwise due under Section 506(b). The plain language of the statute rebuts that argument. Section 506(b), as construed in *Ron Pair*, requires the court to grant a creditor an allowed secured claim for interest on an allowed secured claim to compensate the creditor for the delay in pay;ment occasioned by the pendency of the bankruptcy case.[13] Because Section 1322(b)(5) simply permits the debtor to "cur[e] any default within a reasonable time," and does not itself set forth the terms for curing the default, Section 1322(b)(5) is not inconsistent with Section 506(b) and thus the interest provided under Section 506(b) must be paid to compensate creditors for the delay occasioned by a cure permitted by Section 1322(b)(5).[14]

[12] This Court has granted a writ of certiorari in *Nobelman* v. *American Savings Bank*, No. 92-641 (Dec. 7, 1992), to consider whether Section 1322(b)(2) permits bankruptcy courts to alter the portion of a home mortgage creditor's claim that exceeds the value of the creditor's collateral. We express no view on that question.

[13] Petitioners suggest (Pet. Br. 12-13) that *Ron Pair*'s interpretation of Section 506(b) does not apply in Chapter 13 proceedings, or with respect to the cure of a default on a long-term debt in a Chapter 13 proceeding, pointing out that neither of those circumstances were present in *Ron Pair*. Petitioners do not, however, identify any reason to believe that either of those circumstances are relevant under Section 506(b), the terms of which flatly require courts to allow a claim for preconfirmation interest to oversecured creditors, without regard to the chapter under which the case was filed. Compare 11 U.S.C. 103(a) ("[With an exception not relevant here], chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title.").

[14] For similar reasons, petitioners err in arguing (Pet. Br. 17-20) that the terms of the cure under Section 1322(b)(2) are determined exclusively under nonbankruptcy law. Section 506(b) plainly offers two bases for payment of preconfirmation interest. The first depends on the contractual agreement

3. As discussed above, Section 1325(a)(5)(B)(ii) provides that a court can confirm a plan that allows the debtor to retain collateral over the objection of a secured creditor only if the plan requires payments to the creditor with a present value equal to the amount of the creditor's allowed secured claim. Contrary to the suggestion of some of the lower courts, see note 11, *supra*, the provision applies of its own force to creditors whose rights are adversely affected by a cure imposed under Section 1322(b)(5). On its face, the provision applies to "each allowed secured claim provided for by the plan." Section 1325(a)(5). Whatever play there may be in that language, a plan certainly "provide[s] for" a claim when it imposes a schedule of payment that defers rights to collect payment that existed under the agreement of the parties before the bankruptcy. In this case, petitioners owed respondent back mortgage payments, all of which were immediately due and payable at the time the bankruptcies were filed. The plans

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of the parties, a matter generally determined under state law. See Section 506(b) (requiring court to allow a claim for "any reasonable fees, costs, or charges provided for under the agreement under which such claim arose"). The second—the provision at issue in *Ron Pair*—provides interest automatically, without regard to state law. Similarly, Section 1325(a)(5) recognizes that bankruptcy plans may impose delays on payment that would not be permissible under the agreement of the parties. If a plan imposes such a delay on payment of a secured claim, it must compensate the creditor for the delay, without regard to provisions of state law concerning payment of interest on the claim in a nonbankruptcy setting. Put another way, the Supremacy Clause of the Constitution, Art. VI, Cl. 2, prevents state laws from prohibiting the payment of interest required by the Bankruptcy Code.

established schedules of repayment that deprived respondent of its right to full and immediate payment (enforceable by a right to foreclose) and substituted a right to a series of monthly payments over periods ranging from 24 to 60 months. See J.A. 4, 20; Pet. App. A9 (provisions of Chapter 13 plans providing for payment of arrearages owed to respondents). That alteration of respondent's rights may have been permissible under Section 1322(b)(5), but there is no plausible basis, in the text of the Bankruptcy Code or elsewhere, for the suggestion that the plans effecting that alteration did not "provid[e] for" respondent's claims. Accordingly, Section 1325(a)(5) entitles respondent to compensation for the delay imposed by the plans.[15]

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[15] As our discussion suggests, we believe that the language of the Bankruptcy Code is so clear that recourse to the legislative history is unnecessary. In any event, the legislative history sheds little light on the question whether Sections 1322(b)(2) and 1322(b)(5) should be construed as enacting a rule especially disfavoring home mortgage lienholders seeking interest. The special treatment for home mortgage lienholders did not appear in the House Bill, H.R. 8200, 95th Cong., 1st Sess. (1977), but a broader form of the provision did appear in Section 1322(b)(2) of the Senate Bill, S. 2266, 95th Cong., 2d Sess. (1978), which prevented modification of secured "claims wholly secured by mortgages on real property." The Senate Report does little more than paraphrase that provision. See S. Rep. No. 989, 95th Cong., 2d Sess. 12-13, 141 (1978). There is no committee report explaining why Congress chose to enact a modified version of the Senate bill, but Senator DeConcini and Representative Edwards each introduced into the Congressional Record for his respective Chamber detailed comments explaining in substantially identical terms that the final provision—which limits the special treatment to home mortgage lienholders—"represents a compromise agreement

C. The Treatment Of Secured Creditors Before Passage Of The Bankruptcy Code Does Not Support A Bar On Interest Payments To Oversecured Creditors Adversely Affected By A Chapter 13 Plan

Finally, some authorities have suggested that practice under the old Bankruptcy Act justifies denying interest to oversecured creditors in the absence of an express agreement allowing interest. See *In re Capps*, 836 F.2d 773, 777 n.9 (3d Cir. 1987) (citing 5 *Collier on Bankruptcy* ¶ 1322.09[4], at 1322-25 (Lawrence P. King 15th ed. 1992) [hereinafter *Collier*]). That suggestion is incorrect for two reasons. First, the authorities on which *Collier* relies held only that a referee in a Chapter XIII proceeding could enjoin foreclosure pending cure; they did not hold that the court also could defer the schedule for past-due payments without compensating an oversecured creditor for the delay.[16] In any event, analy-

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between similar provisions in the House bill and Senate amendment," and that "[i]t is intended that a claim secured by the debtor's principal residence may be treated with under section 1322(b)(5)." 124 Cong. Rec. 32,409, 34,009 (1978). Hence, nothing in the legislative history contradicts the plain meaning of the controlling statutory text.

[16] The two authorities cited by *Collier* (see *Collier, supra*, ¶ 1322.09[4], at 1322-25 n.27, ¶ 1322.09[2], at 1322-22 nn.13-14) are *Hallenbeck* v. *Penn Mutual Life Insurance Co.*, 323 F.2d 566 (4th Cir. 1963), and *In re Garrett*, 203 F. Supp. 459 (N.D. Ala. 1962). In *Hallenbeck*, the court of appeals concluded that the bankruptcy referee had the power to enjoin a foreclosure, but noted that "the owner of the secured indebtedness must not be required to accept less than the full periodic payments specified in his contract," 323 F.2d at 572, and remanded the case for further proceedings to determine whether an injunction would be appropriate, *id.* at 574. Similarly, in *In re Garrett* there apparently were no arrearages

sis of pre-Code practice in light of the provisions of the new Bankruptcy Code makes it clear that the pre-Code practice provides no support for a rule barring either preconfirmation interest or postconfirmation interest.

First, with respect to preconfirmation interest, this Court itself has noted the lack of certainty under pre-Code practice regarding the circumstances under which preconfirmation interest was available to oversecured creditors. See *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 246-249 (1989). But whatever the pre-Code practice might have been, this Court concluded that Congress resolved the question in the creditor's favor by enacting Section 506(b), which makes interest available as a matter of federal law even if the debtor has not expressly contracted to pay it. See 489 U.S. at 240-243. Neither petitioners nor any of the lower courts have identified any reason to believe that pre-Code practice would support a different rule for lienholders whose collateral is a home. Accordingly, the pre-Code practice cannot support a rule barring the payment of preconfirmation interest to oversecured home mortgage lienholders.

With respect to postconfirmation interest, the dramatically different nature of pre-Code proceedings makes the relevance of the pre-Code practice quite limited. Under the old Bankruptcy Act, it is clear that a court could not properly have forced a secured creditor

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at all; the plan approved by the court required the contractually scheduled payments to be made on a monthly basis. Thus, neither of those cases clearly authorized a plan deferring a secured creditor's right to collect arrearages, much less a plan deferring the creditor's right to collect without providing for payment of interest to compensate for the delay.

to accept a Chapter XIII plan that deferred the creditor's right to collect past-due payments at all, much less a plan that deferred those payments without compensating the secured creditor for the delay. Section 652(1) of the Bankruptcy Act, 11 U.S.C. 1052(1) (1976), barred a debtor in a Chapter XIII proceeding from filing any plan unless it had "been accepted in writing * * * by the secured creditors whose claims [we]re dealt with by the plan." Hence a Chapter XIII plan could not alter the rights of any secured creditor without that creditor's consent.[17] Because Chapter 13 of the Bankruptcy Code adopted a quite different scheme, which allows courts to adopt a plan over the objections of a secured creditor—but only if it either returns the collateral to the creditor or offers payments with a present value equal to the creditor's allowed secured claim—the pre-Code practice has little relevance in determining the scope of the alterations permitted under current law. But the stringent protections given secured creditors under the old system certainly cannot support the notion that bankruptcy proceedings should not require debtors to pay interest to oversecured creditors whose rights to collect from their debtors are deferred by a Chapter 13 plan.

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[17] For a detailed description, see Richard E. Poulos, *The Secured Creditor in Wage Earner Proceedings: Dream Versus Reality*, 44 Nat'l Ass'n Ref. Bankr. 68, 73-76 (1970); see also Vern Countryman, *Partially Secured Creditors Under Chapter XIII*, 50 Am. Bankr. L.J. 269, 270 (1976) ("[B]efore a plan can be confirmed, § 652 requires that it be accepted by * * * each secured creditor whose claim is dealt with by the plan."); *Collier, supra*, ¶ 1325.06[1], at 1325-30 to 1325-32 (Supp. 1992).

At its heart, this case involves a principle fundamental to the Bankruptcy Code: Although bankruptcy courts have flexibility in determining how to treat secured creditors, they cannot approve plans of reorganization that do not promise to give such creditors property with a present value equal to the total amount of their secured interest in the debtor's property. Nothing in the Code supports the notion that home mortgage lienholders should be singled out and denied this protection; to the contrary, if anything, Congress singled them out for special protective treatment. The decision of the court of appeals correctly applied the relevant provisions of the Code and thus should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 506(b) of the Bankruptcy Code, 11 U.S.C. 506(b), provides:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

2. Section 1322(b) of the Bankruptcy Code, 11 U.S.C. 1322(b), provides, in pertinent part:

> Subject to subsections (a) and (c) of this section, the plan may—
>
> * * * * *
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;
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> * * * * *
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;
>
> * * * * *

3. Section 1325(a)(5) of the Bankruptcy Code, 11 U.S.C. 1325(a)(5), provides:

> Except as provided in subsection (b), the court shall confirm a plan if—
>
> * * * * *
>
> (5) with respect to each allowed secured claim provided for by the plan—
>
> (A) the holder of such claim has accepted the plan;
>
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
>
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
>
> (C) the debtor surrenders the property securing such claim to such holder.

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In the

Supreme Court of the United States

OCTOBER TERM, 1992

DONALD NEAL RAKE, ET AL.,
Petitioners,
v.
WILLIAM J. WADE, TRUSTEE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Motion for Leave to File Brief Amicus Curiae and Brief of Consumer Education and Protective Association, Dunella M. Wesby, Marie R. Allard, and Chapter 13 Trustees Gary Gaertner and Edward Sparkman, as Amici Curiae in Support of Petitioners

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iv

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.....1

INTEREST OF AMICI CURIAE.....4

SUMMARY OF THE ARGUMENT.....7

ARGUMENT.....12

I. THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE PERMITS CHAPTER 13 DEBTORS TO CURE DEFAULTS ON LONG TERM DEBT WITHOUT HAVING TO PAY "INTEREST ON ARREARS".....12

A. This Court's Inquiry Need Go No Further Than an Examination of the Plain Language of the Code.....12

B. In § 1322(b)(5) Congress Gave Chapter 13 Debtors the Power to Remedy Defaults in Accordance With Their Contractual Obligations.....19

C. Unlike Other Payment Provisions in the Code, § 1322(b)(5) Does Not Contain a Requirement That Chapter 13 Debtors Pay Compensation Over and Above the Amount Needed to Cure a Default, But Instead Requires Only That the Cure Be Accomplished "Within A Reasonable Time".....23

Page

1. The "reasonable time" condition of § 1322(b)(5) is inconsistent with a "present value" requirement.....26

2. The Code states explicitly when interest must be paid to pay an allowed claim in full.....27

3. Under another Code "cure" provision, Congress was explicit when it imposed compensation requirements over and above the amount due under the contract to effect a cure.....32

II. THE OVERALL SCHEME OF CHAPTER 13 REVEALS A CONGRESSIONAL INTENT TO TREAT THE CURING OF DEFAULTS DIFFERENTLY FROM PAYMENT OF A "CLAIM" IN FULL.....36

A. The Present Value Requirement of § 1325(a)(5)(B), Which Conditions Chapter 13 "Cramdowns", Has No Bearing on the Use of a Plan to Cure a Default While Maintaining Current Payments on a Secured Obligation Which Is Not Being Discharged.....39

B. Section 506(b), As Construed By Ron Pair, Concerns The Evaluation Of A "Claim," Not The Conceptually Distinct Concept Of Arrears On The Claim.....43

Page

III. THE RELEVANT LEGISLATIVE HISTORY AND POLICY CONSIDERATIONS ALSO SUPPORT PETITIONERS' POSITION.....48

A. The Legislative History Demonstrates That Congress Intended To Create a Federal Right to Deaccelerate and Cure Home Mortgage Defaults While Leaving It to State Law and the Mortgage Contract to Specify What Sum Must Be Paid in Order To Effectuate a Cure.....48

B. In Most Cases It Is Unsecured Creditors Who Would Be Harmed If Debtors Are Required to Pay Interest On Arrears To Cure a Default.....56

CONCLUSION.....58

TABLE OF AUTHORITIES

FEDERAL CASES

Appeal of Capps, 836 F.2d 773 (3rd Cir. 1987) . . . 18, 22

In re Bender, 86 B.R. 809 (Bankr. E.D. Pa. 1988) . . 37

Butner v. United States, 440 U.S. 48 (1978) 23

In re Clark, 738 F.2d 869 (7th Cir. 1984) 20, 21

In re Colegrove, 771 F.2d 119 (6th Cir. 1985) . . . 38, 45

Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984) 20

Grubbs v. Houston First American Sav. Ass'n, 730 F.2d 236 (5th Cir. 1984) 49, 52

Hallenback v. Penn Mutual Life Ins. Co., 323 F.2d 566 (4th Cir. 1963) 50

In re Hillsborough Holdings Corp., 126 B.R. 895 (Bankr. M.D. Fla. 1991) 34

Immigration and Naturalization Servs. v. Cardoza-Fonseca, 480 U.S. 421 (1987) 14

In re Laguna, 944 F.2d 542 (9th Cir. 1991) 17

Landmark Financial Services v. Hall, 918 F.2d 1150 (4th Cir. 1990) 17, 23, 25 42, 43, 46 48

In re Manville Forest Products, Inc., 43 B.R. 293 (Bankr. S.D.N.Y. 1984) 23

Mills Music, Inc. v. Snyder, 469 U.S. 153 (1985) . . 19

Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 110 S. Ct. 2126 (1990) 14

Perrin v. United States, 444 U.S. 37 (1979) 19

United States v. Ron Pair Enters., Inc., 489 U.S. 235, 109 S. Ct. 1026 (1989) 8, 10, 14 15, 43, 46

Sapos v. Provident Institution of Savings, 967 F.2d 918 (3d Cir. 1992) 43, 46

In re Taddeo, 685 F.2d 24 (2d Cir. 1982) 21

In re Terry, 780 F.2d 894 (11th Cir. 1985) 18

Toibb v. Radloff, 501 U.S. ____, 111 S. Ct. 2197 (1991) 14

United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365 (1988) 2, 10, 15 16, 29, 31 32, 45

In re University Cafeteria, Inc., 47 B.R. 404 (W.D. Va. 1985) 34

Vanston Bondholders Protection Committee v. Green, 329 U.S. 156 (1946) 32

Wade v. Hannon, 968 F.2d at 1037 (10th Cir. 1992). . 24, 44

STATE CASES

Carolina Commercial Bank v. Allendale Furniture Co., 280 S.C. 247, 312 S.E.2d 569 (1984) 20

Chesterton State Bank v. Coffey, 454 N.E.2d 1233 (Ind.App. 1983) 20

Federal National Mortgage Association v. Bryant, 62 Ill. App. 3d 25, 18 Ill.Dec. 869, 378 N.E.2d 333 (1978) . 20

Jack LaLanne Biltmore Health Spa, Inc. v. Builtland Partners, 99 A.D.2d 705, 471 N.Y.S.2d 854 (1984) . 20

FEDERAL STATUTES

11 U.S.C. 1129(b)(2)(A)(i)(IV), ... 17

11 U.S.C. § 362(d) 30, 54

11 U.S.C. §365(b)(1) 9, 17, 32, 33, 34

11 U.S.C. § 502(a) 47

11 U.S.C. § 506 . . . . . 19, 42, 45

11 U.S.C. § 506(b) 8, 10, 30, 32, 37, 38, 43, 45, 46

11 U.S.C. § 1107(a) 32

11 U.S.C. § 1124(2) 17, 34

11 U.S.C. §1129(b) 28

11 U.S.C. § 1322(b)(5) 2, 6, 7, 12, 15, 16, 17, 19, 25, 26, 27, 29, 31, 34, 35, 36, 38, 39, 40, 41, 42, 44, 48, 50, 52, 53, 54

11 U.S.C. § 1325(a)(5) 10, 13, 17, 23, 37, 40, 41, 42, 56

11 U.S.C. § 1328(a)(1) 10, 18, 41

STATE STATUTES

Pa. Stat. Ann. tit. 41, § 404 (Purdon 1992) 5, 22

LEGISLATIVE HISTORY

124 Cong. Rec. H11089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), reprinted in 1978 U.S. Code Cong. & Admin. News 6436, 6481 52

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Report of the Bankruptcy Laws Commission, Part II, H.R. Doc. No. 137, 93rd Cong., 1st Sess. 204-06 (1973), reprinted in Appendix 2, Collier on Bankruptcy (1992) 49, 50, 51

H.R. Rep. No. 595, 95th Cong., 1st Sess. 1-3; 118-25 . 49, 51

MISCELLANEOUS

Bankruptcy Rules of Procedure: Official Form 10 . . 47

5 Collier on Bankruptcy ¶1322.09[4] (15th ed. 1992) .18, 43, 51

Uniform Consumer Credit Code, §5.111 22

Webster's Third International Dictionary 555 (1971) . 20

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Consumer Education Protective Association (CEPA), Dunella M. Wesby, Marie Allard and Chapter 13 Standing Trustees Gary J. Gaertner (for the Western District of Pennsylvania) and Edward Sparkman (for the Eastern District of Pennsylvania) hereby respectfully move for leave to file the following joint brief amicus curiae in this case. The consent of David A. Carpenter, attorney for the petitioner, has been obtained. The consent of Lawrence A. G. Johnson, attorney for the respondent, was requested and refused.

The interests of the amici are set forth in the brief in a separate section entitled "Interest of Amici Curiae," which section is incorporated by this reference.

This brief will assist the Court in resolving this case. It extends petitioner's "plain meaning" argument to a complete analysis of the words contained in 11 U.S.C. § 1322(b)(5). It contrasts § 1322(b)(5) with other chapter 13 payment provisions which, unlike § 1322(b)(5), do expressly provide for interest. Further, this brief goes beyond petitioner's argument to place § 1322(b)(5) into context within the overall scheme of Chapter 13 of the Bankruptcy Code and within the legislative history which produced it. Finally, this brief discusses the impact of this Court's decision in United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365 (1988) on the statutory interpretation required in this case.

Amici believe that the brief they request permission to file contains a more

complete argument of the position supporting reversal of the Court of Appeals. If amici's argument are accepted, they would be dispositive of the case.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

Amicus Consumer Education and Protective Association, Inc. (CEPA) is a membership organization of primarily low-income consumers based in Pennsylvania. CEPA is dedicated to advancing the cause of consumer rights, and in particular, the support and protection of those statutory remedies designed to enable economically distressed homeowners the opportunity to save their homes from foreclosure. Principal among these remedies is, of course, chapter 13 of the Bankruptcy Code which has enabled hundreds of CEPA's members to address the burden of their debt, including, most critically, the opportunity to set up affordable payment plans for curing defaults on their home mortgages.

CEPA's particular interest in this case is two-fold. First, a decision

requiring chapter 13 "cure" plans to pay present value interest on arrears would substantially increase the burden that chapter 13 places on low-income debtors and, in many cases, would put this remedy beyond the reach of homeowners who, but for the added payment requirement, could save their home. Second, since Pennsylvania homeowners have a state law right to cure mortgage defaults without payment of interest on the amount in default, see Pa. Stat. Ann. tit. 41, § 404 (Purdon 1992), such a decision would increase the cost for Pennsylvania homeowners to cure a default under chapter 13 by providing a windfall to mortgage lenders. Both results, CEPA believes, would be contrary to the intent underlying the chapter 13 remedy.

Amici Dunella M. Wesby and Marie R. Allard are individuals who have filed

bankruptcy cases under chapter 13 of the Bankruptcy Code in the Eastern District of Pennsylvania and the District of Massachusetts respectively. Their bankruptcy plans provide for cure of defaults on their existing home mortgages pursuant to 11 U.S.C. § 1322(b)(5). Because of their low fixed incomes, a requirement of payment of interest on the arrears due under their mortgage could prevent them from curing their defaults in bankruptcy. Ms. Wesby and her four children could lose their home of 14 years. Ms. Allard, an elderly individual, could lose her home of 48 years.

Amici Gary Gaertner and Edward Sparkman are Chapter 13 Standing Trustees in the bankruptcy courts for, respectively, the Western District and Eastern District of Pennsylvania. They have the statutory duty to review and

administer chapter 13 plans and represent the interest of the bankruptcy estate. A decision requiring payment of interest on arrears in plans curing mortgage defaults could, in some cases, substantially increase the payments required to be made to secured creditors at the expense of unsecured creditors and would, they believe, undermine the delicate balance of creditor rights that exists under chapter 13.

SUMMARY OF THE ARGUMENT

The petitioner chapter 13 debtors proposed to cure their respective mortgage defaults under 11 U.S.C. § 1322(b)(5) by paying all amounts owing under their mortgage contracts over the life of their plans, while maintaining current payments on the mortgages. The cure amounts include back payments of interest and principal, late penalties and other

default charges, as provided by the respective contracts. The Court of Appeals for the Tenth Circuit ruled that these payments were insufficient on the ground that the Bankruptcy Code creates a federal right to interest on all amounts needed to effect a cure under the contract between the parties, even though state law would not require the payment of such interest.

The lower court reached this result by equating the payment of an arrearage on a debt being reinstated with the payment of the full balance of a debt, i.e., the entire claim. Then, having equated the arrearage with the creditor's "allowed secured claim," the court held that 11 U.S.C. § 506(b), as construed in United States v. Ron Pair Enters., Inc., 489 U.S. 235, 109 S.Ct. 1026 (1989) requires the debtors to pay interest on interest, on

late penalties and on the other components of the arrearage.

The reasoning of the court of appeals, which rejected the decisions of four other circuits, is at odds with the plain meaning of § 1322(b)(5). Unlike other payment provisions in the Bankruptcy Code, this section does not require chapter 13 debtors to pay compensation over and above the amount needed to cure a default. Instead, § 1322(b)(5) requires only that the cure be effected "within a reasonable time." In contrast, another "cure" provision in the Code, 11 U.S.C. § 365(b)(1), expressly requires payment of interest.

Moreover, the overall scheme of Chapter 13, as well as its underlying purposes and history, reveal a clear Congressional intent to treat the curing of a default on a long term debt in a

conceptually distinct way from the payment and discharge of the "allowed secured claim." Section 506(b), as construed by Ron Pair, concerns the evaluation of the "claim," not an arrearage on the claim. The Code's use of interest as a way of compensating creditors for the delay in payment caused by bankruptcy comes from the chapter 13 "cramdown" provision, 11 U.S.C. § 1325(a)(5), which applies to claims, not arrearages on claims. Unlike "claims" which are discharged or paid in full in a chapter 13 case, debts treated under §1322(b)(5) are not discharged and the contract between the parties survives the bankruptcy. 11 U.S.C. § 1328(a)(1).

As this Court held in United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365 (1988), the delicate balance struck by Congress regarding the relative rights of creditors

should not tampered with by statutory interpretations which, in attempting to protect secured creditors, depart from the words of the statute and the scheme Congress has adopted. The asserted right to "interest on arrears" is not in the statute, nor would the inference of such a right be consistent with the text, the purpose or the history of the Bankruptcy Code. Adoption of the Tenth Circuit's holding would create an unintended economic benefit for secured creditors at the expense of unsecured creditors.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE PERMITS CHAPTER 13 DEBTORS TO CURE DEFAULTS ON LONG TERM DEBT WITHOUT HAVING TO PAY "INTEREST ON ARREARS"

A. This Court's Inquiry Need Go No Further Than an Examination of the Plain Language of the Code.

Section 1322(b)(5) of the Bankruptcy Code[1] provides that a chapter 13 plan may "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending" on long term debt. At issue in this case is whether a chapter 13 debtor who is curing a home mortgage default over the duration of his or her plan is required by the Bankruptcy Code to compensate an oversecured mortgagee for the time delay in receiving the funds needed to cure.

[1] 11 U.S.C. § 1322(b)(5).

In more practical terms, the question is whether, in addition to the monthly installments of principal and interest, late charges, costs, and other default penalties provided by the mortgage contract (all amounts hereinafter referred to collectively as "the arrearage"), a debtor must also pay "present value" interest[2] on the total arrearage in order to effect a cure of a pre-bankruptcy default pursuant to 11 U.S.C. § 1325(b)(5).

As in all cases of statutory construction, the starting point in this

[2] The term "present value interest" is derived from 11 U.S.C. § 1325(a)(5)(B)(ii) and is used colloquially by bankruptcy practitioners to refer to the additional sums which must be made to render a bankruptcy plan's stream of payments on an allowed secured claim equal to "the value, as of the effective date of the plan" of the allowed claim.

case must be statutory language itself.[3] "[T]he strong presumption [is] that Congress expresses its intent through the language it chooses." Immigration and Naturalization Servs. v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987).

This is especially true in the bankruptcy context. Congress worked on the formulation of the Bankruptcy Code for nearly a decade. The Code was established to modernize the bankruptcy laws and as a result made major changes in the substantive laws of bankruptcy, particular regarding the treatment of secured claims. United States v. Ron Pair Enters., Inc.,

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[3] Toibb v. Radloff, 501 U.S. ____, 111 S. Ct. 2197 (1991); Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 110 S. Ct. 2126, 2130 (1990); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 109 S. Ct. 1026, 1030 (1989).

489 U.S. 235, 240, 109 S. Ct. 1026, 1030 (1989). As this Court stated in Ron Pair,

> In such a substantive overhaul of the system, it is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain meaning of the statute.

Ron Pair, 489 U.S. at 240, 109 S. Ct. at 1030.

Thus, the starting point in interpreting the chapter 13 right to cure must be the language of § 1322(b)(5) itself. To the extent that provision is subject to alternative interpretations, one must look to the statutory scheme as a whole in order to determine the meaning Congress intended when it chose particular language. As observed in United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365 (1988), a bankruptcy case which, like this one,

involved a secured creditor's assertion under the Code of an entitlement to "present value" payments:

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme--because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

484 U.S. at 371 (citations omitted).

In this case, the plain language of the Code, viewed as a whole, is clear. The ordinary meaning of "curing a default" as well as the absence of any reference to "interest" or "value" in § 1322(b)(5) precludes the "interest on arrears" position adopted by the Tenth Circuit.

The significance of the absence of any reference to "interest" or "present value" in § 1322(b)(5) is buttressed by other provisions in the Code which permit

a debtor to make payments as a means of adjusting a debtor-creditor relationship in which there was a prepetition default. In contrast to § 1322(b)(5), these other Code provisions[4] explicitly impose some additional payment obligations on a debtor wishing to invoke a particular Code remedy following a prepetition default in payments to a creditor.[5]

Not only is there no textual basis for a requiring the payment of interest under § 1322(b)(5), but the overall scheme for treating secured debt in chapter 13 proceedings mandates a rejection of the Tenth Circuit's holding. As recognized by four courts of appeals,[6] the Bankruptcy

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[4] 11 U.S.C. §§ 365(b)(1), 1124(2), 1129(b)(2)(A)(i)(II), 1325(a)(5)(B)(ii).

[5] See Part I.C.2, at p. 27, infra.

[6] In re Laguna, 944 F.2d 542 (9th Cir. 1991); Landmark Financial Services v. Hall, 918 F.2d 1150 (4th Cir. 1990);

Code reveals an unambiguous distinction between, on the one hand, curing a default on a secured claim which survives a discharge from, on the other, paying off and discharging a secured claim under the plan.

When a cure is effectuated, the prepetition contract is reinstated and remains in force following the bankruptcy pursuant to 11 U.S.C. § 1328(a)(1). When a claim is paid off, the contract, the personal obligation and the security interest are discharged by payment. Only in the latter situation is the secured creditor entitled to receive "present value" of the amount to be paid by the debtor in the plan. Those Code provisions which deal with the valuation and payment

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Appeal of Capps, 836 F.2d 773 (3rd Cir. 1987) In re Terry, 780 F.2d 894 (11th Cir. 1985). See also 5 Collier on Bankruptcy ¶1322.09[4] (15th ed. 1992).

of "secured claims," §§ 506 and 1325(a), are not authority for requiring chapter 13 debtors to pay present value on plan payments which are made not for the purpose of paying the "claim," but instead, are made for the purpose of reinstating an obligation in default.

B. In § 1322(b)(5) Congress Gave Chapter 13 Debtors the Power to Remedy Defaults in Accordance With Their Contractual Obligations.

Although "curing a default" is not defined in the Code, this phrase certainly has a generally accepted usage within the language of debtor-creditor relationships, which should be applied in construing 11 U.S.C. § 1322(b)(5).[7] This common meaning

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[7] "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42 (1979); accord, Mills Music, Inc. v. Snyder, 469 U.S.

was explored extensively by the Seventh Circuit in In re Clark, 738 F.2d 869, 872 (7th Cir. 1984):

> Absent a persuasive reason to the contrary, we are to attribute to the words of a statute their common meaning. (citations omitted) The common meaning of "cure" is to remedy, restore, remove, or rectify, see Webster's Third International Dictionary 555 (1971), and as the term relates to defaults, "cure" means to restore matters to the status quo ante. See, e.g., Jack LaLanne Biltmore Health Spa, Inc. v. Builtland Partners, 99 A.D.2d 705, 471 N.Y.S.2d 854, 856 (1984) (default on lease); Carolina Commercial Bank v. Allendale Furniture Co., 280 S.C. 247, 312 S.E.2d 559, 571-72 (1984) (default on mortgage loan); Chesterton State Bank v. Coffey, 454 N.E.2d 1233, 1237 (Ind.App. 1983) (using cure in the sense of "remedy"); Federal National Mortgage Association v. Bryant, 62 Ill.App.3d 25,28, 18 Ill.Dec. 869, 378 N.E.2d 333,336 (1978) (mortgage). Ordinarily, the means by which one cures a default is by paying all amounts due and owing; however, "cure" is the end, not the means, and what the term refers to is the restoration of the way things were before the default.

738 F.2d at 872.

A cure of a default has several consequences. First, the phrase clearly includes a concept of deacceleration and delayed performance. To cure a default means to remedy the event which triggered the default (generally, the nonpayment of amounts due under the relevant contract) through a subsequent performance, to nullify the contractual consequence of the nonpayment (generally, acceleration of the entire principal balance), and to return the debtor and creditor to their pre-default circumstances. See, e.g., In re Taddeo, 685 F.2d 24, 26-27 (2d Cir. 1982). Second, it is the contract being cured which defines what performance must be done in order to effectuate the cure. As observed by the Third Circuit:

153, 164 (1985); Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772 (1984).

> Cure by its very nature assumes a regime where debtors reinstate defaulted debt contracts in accordance with the conditions of their contracts. Usually the terms for cure are provided in the contracts themselves.

Appeal of Capps, 836 F.2d 773, 777 (3d Cir. 1987).

In summary, the function of a cure is simply to enable the debtor to remedy a failure to perform under a contractual obligation. Therefore, in the absence of some overriding federal interest statutorily expressed by Congress in the text of the Bankruptcy Code, it is the contract itself and applicable nonbankruptcy law[8] which must define the

[8] For example, in Pennsylvania there is a statutory right to cure a default on a residential mortgage obligation and the amount needed to cure is fixed by this statute. Pa. Stat. Ann. tit. 41, § 404 (Purdon 1992). Similarly, a number of states have enacted the 1974 Uniform Consumer Credit Code which contains a right to cure various secured consumer credit contracts in §5.111. That

performance necessary to effect a cure of a prepetition default under 11 U.S.C. § 1325(b)(5). See Butner v. United States, 440 U.S. 48, 55 (1978) (absent express provisions in federal bankruptcy law, the nature and extent of property rights in the assets of the debtor's estate are left to state law).

C. Unlike Other Payment Provisions in the Code, § 1322(b)(5) Does Not Contain a Requirement That Chapter 13 Debtors Pay Compensation Over and Above the Amount Needed to Cure a

section then specifies the requirements of a cure.

To the extent a claim for interest on an arrearage encompasses a claim for interest on unpaid interest (compound interest), there is an extensive body of state law which would prohibit such claim. See Landmark Financial Services v. Hall, 918 F.2d at 1155-56; In re Manville Forest Products, Inc., 43 B.R. 293, 300 n.6 (Bankr. S.D.N.Y. 1984). Creditors typically liquidate the damage accruing by virtue of late payments by imposing "late charges" under the contract. A creditor would receive a windfall if it obtained interest on late charges included as an element of the arrears.

Default, But Instead Requires Only That the Cure Be Accomplished "Within A Reasonable Time".

In this case, the bankruptcy court confirmed a plan which proposed to cure the default on the debtor's home mortgage obligation by paying all the missed payments, plus all other default charges imposed by the mortgage contract. Among the default charges were late fees and interest on insurance advancements made by the mortgagee. 968 F.2d at 1037 & n.4. The district court affirmed the bankruptcy court order.

In its decision reversing the lower courts, the Court of Appeals ruled that the Bankruptcy Code, not the mortgage contract, entitled the mortgagee to interest on the entire cure amount being paid, not just on the insurance advancements, as the contract provided. Thus, according to the Court of Appeals,

the Bankruptcy Code required payment of interest on the missed payments--which themselves include interest--and on late fees.

As the Court of Appeals acknowledged, this result was clearly not grounded in the text of the Code's chapter 13 cure provision itself. Section 1322(b)(5) contains no language that debtors must pay this additional interest amount. Congress did use conditioning language, but only that cure take place "within a reasonable time," and that such cure be accompanied simultaneously with "maintenance of payments while the case is pending." 11 U.S.C. § 1322(b)(5). See Landmark Financial Services v. Hall, 918 F.2d 1150, 1153 (4th Cir. 1990).

1. The "reasonable time" condition of § 1322(b)(5) is inconsistent with a "present value" requirement.

The conscious rejection by Congress of some notion of present value compensation in § 1322(b)(5) is inherent in the requirement that cures be accomplished "within a reasonable time." Present value interest is a compensatory device designed to nullify the effect of a time delay in the payment of money. It makes little sense to conceive of a stream of present value payments as being limited to "a reasonable time," given that the whole purpose of present value is to compensate the creditor fully for the economic loss caused by the passage of time. The only sensible interpretation is to conclude that Congress chose to condition chapter 13 cures with the

"reasonable time" requirement instead of a present value requirement.

2. The Code states explicitly when interest must be paid to pay an allowed claim in full.

The absence of additional qualifying language in § 1322(b)(5) requiring the payment of interest on delinquent installment payments necessarily manifests Congress' decision not to require the payment of interest on arrears. This conclusion is supported by an examination of other Code provisions which involve payment to creditors.

In chapter 13, § 1325(a)(5) explicitly requires that a debtor who wishes to "provide for" (i.e., satisfy) an allowed secured claim, pay the present value of the claim as of the effective

date of the plan.[9] The same requirement is explicit in chapter 11 when a debtor seeks confirmation of a plan without the acceptance of a secured class by virtue of § 1129(b)(2)(A)(i).[10] If Congress had

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[9] Section 1325(a)(5) provides that the court shall confirm a chapter 13 plan if, inter alia:

> (5) with respect to each allowed secured claim provided for by the plan --
>
> (A) the holder of such claim has accepted the plan;
>
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
>
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
>
> (C) the debtor surrenders the property securing such claim to such holder . . . . (emphasis added).

[10] Section 1129(b)(2)(A) provides that a plan is "fair and equitable" within the meaning of § 1129(b)(1) as to an impaired class of secured claims if

intended to require the payment of interest when a chapter 13 debtor sought to cure a default on a mortgage under § 1322(b)(5), surely Congress would have expressed that intent directly in the cure provision itself.

In this respect, the case before the Court is virtually identical to Timbers. In Timbers, the undersecured creditor

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the plan provides:

> (i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property . . . . (emphasis added).

argued that it was entitled to postpetition interest on its allowed secured claim despite the explicit provision in § 506(b) for postpetition interest for oversecured claims and the absence of comparable language for undersecured claims in § 506(b). In rejecting the undersecured creditor's argument that the obligation to pay postpetition interest was inherent in the concept of adequate protection under § 362(d)(1),[11] this Court observed how easy it would have been for Congress to manifest its intent to require payment of postpetition interest on undersecured claims: "§ 506(b) would simply have said that the secured creditor is entitled to interest 'on his allowed claim, or on the value of the property securing his allowed

[11] 11 U.S.C. § 362(d)(1).

claim, whichever is lesser.'" 484 U.S. at 373, 108 S. Ct. at 631.

Similarly, if Congress had intended to require the payment of interest upon delinquent prepetition installments on a claim being cured under § 1322(b)(5), it could have easily written § 1322(b)(5) as follows:

> notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time, maintenance of payments while the case is pending and payment of interest on all delinquent sums due on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

The absence of such or similar language leads to the inescapable conclusion that Congress did not intend to require the payment of interest to effect a cure of a default under § 1322(b)(5).[12]

[12] In Timbers this Court also evoked "historical principles of bankruptcy" in concluding that the

3. Under another Code "cure" provision, Congress was explicit when it imposed compensation requirements over and above the amount due under the contract to effect a cure.

Another important cure provision of the Code is 11 U.S.C. § 365(b)(1) which involves the cure of defaults and the assumption of executory contracts and unexpired leases. The power of a trustee (or, of course, a debtor-in-possession in a chapter 11 case)[13] to assume an executory contract or unexpired lease is often critical to the debtor's reorganization; a debtor may not be able

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creditor's position was implausible. 484 U.S. at 373. Similarly, the traditional disfavoring of claims for interest on interest, see, e.g., Vanston Bondholders Protection Committee v. Green, 329 U.S. 156 (1946), is instructive in construing the language employed by Congress in § 506(b). This provision calls for interest and "fees, costs or charges," not interest on these items, nor interest on interest.

[13] See 11 U.S.C. § 1107(a).

to operate its business without a real property lease or leased equipment needed for operations.

If a prepetition default exists on an executory contract or unexpired lease, § 365(b)(1) of the Code provides that a trustee, may assume the prepetition executory contract or unexpired lease only if the trustee

> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
> (C) provides adequate assurance of future performance under such contract or lease.

(emphasis added).

Unlike § 1325(b)(5), § 365(b)(1) requires not only that a default be "cured," but also that the creditor be compensated for "actual pecuniary loss."

Some courts have construed this additional language, to require that a trustee who assumes an executory contract or unexpired lease pay interest on the delinquent installments as part of the "cure".[14]

At a minimum, the additional statutory language found in § 365(b)(1) but not in § 1322(b)(5), manifests Congress' awareness that a cure of default is conceptually distinct from all of the adverse economic consequences, such as the loss of the time value of money, flowing from a contractual default.[15] If Congress

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[14] In re Hillsborough Holdings Corp., 126 B.R. 895 (Bankr. M.D. Fla. 1991). See also In re University Cafeteria, Inc., 47 B.R. 404 (W.D. Va. 1985).

[15] See also 11 U.S.C. § 1124(2) (providing that a claim is not impaired by a chapter 11 reorganization plan if a prepetition default is cured and the plan "compensates the holder of such claim . . . for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or applicable

intended to require a chapter 13 debtor to pay anything other than the amounts due under the terms of his or her contract to cure a default under § 1322(b)(5), it would have expressed that intent explicitly in § 1322(b)(5).

Since the plain language of § 1322(b)(5) does not contain any support for the "interest on arrears" position, the Court of Appeals had to find this support in the language of some other Code provision. As will now be discussed, these other provisions of the Code, read in light of the overall scheme for treatment of secured claims under chapter 13, fully support the conclusion that Congress intended to give § 1322(b)(5) its commonly understood meaning.

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law").

II. THE OVERALL SCHEME OF CHAPTER 13 REVEALS A CONGRESSIONAL INTENT TO TREAT THE CURING OF DEFAULTS DIFFERENTLY FROM PAYMENT OF A "CLAIM" IN FULL

Section 1322(b) of the Code sets forth the permissible provisions of a chapter 13 plan. Among the permissible provisions of a plan is the curing of a default on a long term obligation under § 1322(b)(5). A separate permissible provision of a plan is the payment in full of certain kinds of secured claims, albeit, in some cases, under terms other than those provided in the original contract between the debtor and creditor. 11 U.S.C. § 1322(b)(2),(8). It is the debtor's choice whether to invoke § 1322(b)(2),(8) or § 1322(b)(5) with respect to a particular secured claim

which is susceptible to treatment under either subsection.[16]

After the debtor has formulated the proposed plan in conformity with § 1322(b), it is § 1325(a) of the Code which then sets forth the statutory requirements which, if met, legally entitle a debtor to confirmation of the chapter 13 plan. Subsection § 1325(a)(5) sets forth the requirements for "providing for" secured claims. What is required is that, in the absence of a creditor's consent, the debtor must either return the collateral or pay over the course of the plan the economic value of the creditor's interest in the collateral, i.e., "the allowed secured claim," as defined by § 506(a). Section 506(b) of the Code establishes the circumstances in which a secured creditor

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[16] E.g., In re Bender, 86 B.R. 809 (Bankr. E.D. Pa. 1988).

may include postpetition interest as a component of its allowed secured claim.

In this case the Tenth Circuit, while recognizing the absence of express language in § 1322(b)(5) which requires the payment of interest on arrears when a debtor proposes to cure a prepetition mortgage default, imported into § 1322(b)(5) the concept from § 506(b) that postpetition interest may be allowed on an oversecured claim. Other courts have reached the same result, by importing the "present value" requirement of § 1325(a)(5) into § 1322(b)(5).[17]

It is possible to treat the payment of interest requirements of § 506(b) and § 1325(a)(5) as a component of a cure effected under § 1322(b)(5) only if the concept of "curing a default" is the exact

[17] E.g., In re Colegrove, 771 F.2d 119 (6th Cir. 1985).

equivalent of "providing for," or paying, an "allowed claim." However, this premise, made by all of the courts which have held that interest must be paid on arrears under § 1322(b)(5), is incorrect. Curing a default and paying a claim are distinct concepts in the adjustment of debtor-creditor relationships under the Code and there is no basis in the text or structure of the Code for treating them interchangeably. Further, the distinction between curing a default and paying a claim is well documented in the Code's legislative history.

A. The Present Value Requirement of § 1325(a)(5)(B), Which Conditions Chapter 13 "Cramdowns", Has No Bearing on the Use of a Plan to Cure a Default While Maintaining Current Payments on a Secured Obligation Which Is Not Being Discharged.

As stated above, § 1325(a)(5) outlines the requirements which must be met for the payment of an allowed secured

claim, in order for the debtor to be entitled to confirmation of a chapter 13 plan. Since creditor consent is not necessary for confirmation, § 1325(a) is often referred to as the chapter 13 "cramdown" provision of the Code.

Just as the text of the chapter 13 cure provision makes no reference to the payment of interest, the language of the chapter 13 cramdown provision makes no reference to the curing of a default. It applies only with respect to distribution in a plan "on account of [an allowed secured] claim."[18]

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[18] If § 1325(a)(5) is not linked to § 1322(b)(5), the question might arise as to how the requirements of maintenance of payments and cure within a reasonable time under § 1322(b)(5) may be enforced. The answer is that, under § 1325(a), a debtor must establish that the proposed plan "complies with the provisions of this chapter and with the other applicable provisions of this title." 11 U.S.C. § 1325(a)(1). Thus, a proposed cure which does not comply with §

This absence of any reference to cure or § 1322(b)(5) in § 1325(a)(5) is most significant in light of the chapter 13 discharge provision, § 1328(a). Under that provision, once a chapter 13 debtor has completed all payments under a confirmed plan, "the court shall grant the debtor a discharge of all debts provided for by the plan, . . . except any debt . . . provided for under section 1322(b)(5) of this title." 11 U.S.C. § 1328(a) (emphasis added).

In other words, secured claims "provided for by the plan" are discharged, while claims simply being cured survive the bankruptcy. Reading this provision together with §§ 1325(a) and 1322(b), any secured claim can be provided for in a plan and discharged, as long as the

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1322(b)(5) would run afoul of § 1325(a)(1).

creditor receives present value. On the other hand, as to a claim being preserved and reinstated in a cure under § 1322(b)(5), the contract remains extant and will survive the bankruptcy. There is no basis for equating the contractual arrearage with the creditor's full "claim" under § 506 solely in order to make the cramdown provision (and the present value requirement contained therein) applicable.

As the Fourth Circuit concluded in Landmark Financial Services, by a panel which included Mr. Justice Powell:

> In a cramdown, the Code requires that the secured creditor receive the present value of his secured claim within the life of the plan. This provision, plus the additional requirement that the creditor retain its lien on the collateral, is the means by which the Code compensates secured creditors for any modifications of their rights. The present value test of § 1325 is designed to factor in the time value of the deferred payments in order to assure full satisfaction of secured claims.

> The cure of a mortgage or other long term debt is a distinct means of treating the claims of some secured creditors. Like a cramdown, it may be imposed on creditors without their consent. It operates, however, in an entirely different manner. Instead of assuring that the creditor receives the full value of his secured claim during the life of the plan, a cure reinstates the original pre-bankruptcy agreement of the parties.

918 F.2d at 1153-54. Accord, Sapos v. Provident Institution of Savings, 967 F.2d 918 (3d Cir. 1992). See also 5 Collier on Bankruptcy ¶1322.09[4] (15th ed. 1992).

B. Section 506(b), As Construed By Ron Pair, Concerns The Evaluation Of A "Claim," Not The Conceptually Distinct Concept Of Arrears On The Claim.

The crux of the Tenth Circuit's position is that Ron Pair "interpreted § 506(b) to require payment of postpetition interest on an oversecured creditor's claim" and that "[o]nly by holding that Congress intended a different result for home mortgages can we escape the

conclusion" that a mortgagee is entitled to interest on an arrearage that is being paid over time. 968 F.2d at 1041. Reading the contrary position from other circuits as assuming "that the mortgagee does not have a 'claim' in the same sense as other secured creditors," 968 F.2d at 1041, the Court referred to the text of § 1322(b)(5) (permitting curing of defaults on "any unsecured claim or secured claim" on which payments will extend beyond the duration of the plan) as evidence that "the Code clearly contemplates that when a mortgagor is in default on payments on a home mortgage the mortgagee has a 'claim' in bankruptcy the same as any other creditor." Id.[19]

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[19] Implicit throughout the opinion of the Court of Appeals is the assumption that secured creditors were intended by Congress to suffer no economic loss whatsoever from the event of bankruptcy. This was also the approach taken by the

The fallacy of this reasoning is its assumption that a "claim" within the meaning of chapter 13 and an arrearage on that claim are one and the same thing. Of course the holder of a mortgage being cured has a "claim" within the meaning of § 506 like that of other creditors. This claim consists of the principal balance and all interest, charges and fees provided for in the mortgage contract, and the claim is a secured claim up to the value of the collateral.[20] Where the creditor has an ample equity cushion in

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Sixth Circuit. See In re Colegrove, 771 F.2d at 119 n.3 ("By allowing the recovery of interest [on arrears] we are merely permitting the creditor to achieve substantially the benefit of its bargain."). This Court has already rejected this generalized approach to statutory construction when interpreting the rights of secured creditors under particular provisions of the Bankruptcy Code. See United Sav. Ass'n v. Timbers of Inwood Forest, 484 U.S. at 379-80.

[20] 11 U.S.C. § 506(a).

the collateral, the "allowed secured claim" will not only include this entire amount, but will also, under § 506(b) and Ron Pair, grow by accretion from the date of filing through the confirmation date. See Landmark Financial Services v. Hall, 918 F.2d at 1155. However, in a plan providing for the cure of a prepetition default, the "claim" is not being paid and, therefore, its valuation is irrelevant to a determination of how much money is needed to cure a default. See Sapos, 967 F.2d at 927-28.[21]

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[21] As the Third Circuit noted in Sapos, mistakenly treating the arrearage as a claim could, in the case of an undersecured creditor, lead to the inequitable result that the arrearage itself could be regarded as undersecured and thereby subject to cramdown. This would reward a debtor who had not kept current in payments before filing for reorganization. 967 F.2d at 927. The Third Circuit was correct in declining to regard the arrearages rather than the payoff figure as the "claim."

That secured claims and arrears on secured claims are distinct concepts under chapter 13 is a principle recognized by the Official Forms which accompany the Bankruptcy Rules of Procedure. Official Form 10 is the required form to be employed by a creditor seeking to file a proof of claim.[22] Creditors are required to state separately the amount of their claim and the amount of any arrearage on the claim. The obvious purpose of this separate statement is to facilitate both possibilities allowed by chapter 13 -- paying the claim itself or merely reinstating the original contractual obligation by curing a default. "The valuation of the claim or the collateral is simply immaterial when the original

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[22] The initial threshold requirement for allowance of a claim is that a proof of claim be filed in the bankruptcy court. 11 U.S.C. § 502(a).

agreement is reinstated and the debtor elects to make all the payments called for by the agreement." Landmark Financial Services v. Hall, 918 F.2d at 1155.

III. THE RELEVANT LEGISLATIVE HISTORY AND POLICY CONSIDERATIONS ALSO SUPPORT PETITIONERS' POSITION.

A. The Legislative History Demonstrates That Congress Intended To Create a Federal Right to Deaccelerate and Cure Home Mortgage Defaults While Leaving It to State Law and the Mortgage Contract to Specify What Sum Must Be Paid in Order To Effectuate a Cure.

The proposition that the cure of a default under § 1322(b)(5) requires the payment of interest on arrears lacks support not only in the text and structure of the Code, but it is belied by the Code's legislative history.

Congress enacted the Bankruptcy Code as the result of legislation passed by both the House and Senate to implement the

recommendations of the Commission on the Bankruptcy Laws of the United States, created by Congress in 1970. With regards to the new chapter 13, the enacted Code by and large adopted both the Commission's criticisms of the existing Chapter XIII and its recommended statutory scheme. See Grubbs v. Houston First American Sav. Ass'n, 730 F.2d 236, 238-39 (5th Cir. 1984) (en banc). See generally H.R. Rep. No. 595, 95th Cong., 1st Sess. 1-3; 118-25 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5963 (hereinafter "House Report").

Section 1322(b) of the Code originated in the initial legislation proposed by the Bankruptcy Commission. See Report of the Bankruptcy Laws Commission, Part II, H.R. Doc. No. 137, 93rd Cong., 1st Sess. 204-06 (1973), reprinted in Appendix 2, Collier on

Bankruptcy (1992) (hereinafter "Commission Report"). It represents the Commission's separate solutions to two separately perceived deficiencies in the prior law.

As to the handling of delinquencies in a debtor's long term mortgage obligation, the Commission noted that the existing statute did not cover mortgage debts at all, but that, nonetheless, bankruptcy courts had often employed their inherent equity powers to specially enjoin foreclosures so as to allow debtors to bring their mortgages current.[23] See Commission Report, Part I, at 165-66. In what ultimately became § 1322(b)(5) of the Code, the Commission recommended codification of this practice so as to enable all chapter 13 debtors, as a matter

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[23] E.g., Hallenback v. Penn Mutual Life Ins. Co., 323 F.2d 566 (4th Cir. 1963).

of right, to be able to cure defaults on long term debt. Commission Report, Part II, at 204-06. See 5 Collier on Bankruptcy ¶ 1322.09[2].

The other perceived problem in existing law regarding the treatment of secured claims addressed by the Commission was the ability of undersecured creditors with a security interest in personal property to exert leverage over debtors disproportionate to the true value of their collateral. See House Report at 124. The Commission's solution to this problem was to allow chapter 13 debtors to alter the size and timing of installment payments owing to all secured creditors, i.e., to "modify" creditors' rights, so long as the payments made through the plan were the economic equivalent of the value of the collateral. See Commission Report, Part II, at 205. This right to modify

ultimately became § 1322(b)(2) of the Code, and the requirement regarding the value of the payment stream being paid on account of such "modified" debt ultimately became the cramdown provision, § 1325(a)(5)(B).

In response to the demands of the residential mortgage industry, Congress chose to insulate claims secured only by a mortgage in the debtor's home from the debtor's power to "modify." 11 U.S.C. § 1322(b)(2). See Grubbs v. Houston First American Sav. Ass'n, 730 F.2d at 242-46. However, Congress left in place the power of a chapter 13 debtor to cure defaults on residential mortgage debt. See Grubbs, 730 F.2d at 242-46; 124 Cong. Rec. H11089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), reprinted in 1978 U.S Code Cong. & Admin. News 6436, 6481; 124 Cong. Rec. S177406 (daily ed. Oct. 6, 1978),

reprinted in 1978 U.S. Code Cong. & Admin. News 6505, 6550.

Having expressly insulated certain mortgage lenders from "modification" and the present value substitute for contractual rights which accompanies modification, Congress gave no indication whatsoever that it intended to graft the present value modification requirement onto the stream of payments required to cure a default. Instead, in the case of mortgage cures, Congress granted debtors the right to enjoin foreclosure, to deaccelerate the obligation and to rectify the default in accordance with the contract provisions, while, over the course of a "reasonable" period of time, maintaining current payments on the obligation. 11 U.S.C. § 1322(b)(5).

In short, in balancing the respective rights of debtors and creditors in chapter

13 cases, Congress chose to permit chapter 13 debtors to satisfy certain secured claims by making payment in full on terms other than those provided in the original contract between the parties, provided that the debtor pay the holder of such a secured claim the present value (i.e., interest) on the claim over the life of the plan.[24] By comparison, in granting chapter 13 debtors the option of curing a default and reinstating a long term obligation, Congress established a different quid pro quo: (1) the debtor must make installment payments on the debt during the life of the plan on the same terms as required by the original contract; (2) the cure of the default must

[24] Secured creditors are also protected, of course, by their right to adequate protection of their interest under 11 U.S.C. § 362(d) and the five-year limitation on the length of chapter 13 plan set by 11 U.S.C. § 1322(c).

be effected within a reasonable time; and (3) the debtor does not receive a discharge of the debt. Because the contract will continue into the future to control the parties relations, it is logical for the contract to control the question of how the cure is to be effectuated.

The two mechanisms for adjusting the relationship of a debtor and a secured creditor under § 1322(b) are so dissimilar that it is impossible to equate the cure of a default with the payment of a claim. Thus, there is no basis to conclude that the requirement that a debtor pay interest when paying a claim should be incorporated into the cure provision of chapter 13.'

B. In Most Cases It Is Unsecured Creditors Who Would Be Harmed If Debtors Are Required to Pay Interest On Arrears To Cure a Default.

11 U.S.C. § 1325(b) requires that in the event of an objection to confirmation of a plan, debtors who cannot pay all their unsecured creditors must instead pay all of their disposable income to unsecured creditors under the plan. "Disposable income" means income which is not reasonably necessary "for the maintenance or support of the debtor or a dependent of the debtor ... ." 11 U.S.C. § 1325(b)(2)(A). If debtors are required to make payments of interest on arrears to cure defaults on secured debts, there will be that much less disposable income available for payments to unsecured creditors.

The Bankruptcy Code creates a delicate balance between the rights of

various creditors and the debtor. A requirement of payment of interest on arrears would undermine that balance by shifting available resources from unsecured to secured creditors.

Similarly, for some debtors with limited disposable income, a requirement of additional payments to secured creditors would undermine their ability to cure defaults and retain property which is subject to the security interest. In the case of home mortgages, which are commonly cured under chapter 13, this means that additional debtors would lose their homes.

CONCLUSION

For all the foregoing reasons, the decision of the Tenth Circuit Court of Appeals in this matter should be reversed in favor of the position taken by the Third, Fourth, Ninth and Eleventh Circuits.

Respectfully Submitted,

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